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## **TRANSCRIPT OF PROCEEDINGS**

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O/N H-919871

**THE HONOURABLE K. HAYNE AC QC, Commissioner**

**IN THE MATTER OF A ROYAL COMMISSION  
INTO MISCONDUCT IN THE BANKING, SUPERANNUATION  
AND FINANCIAL SERVICES INDUSTRY**

**MELBOURNE**

**9.30 AM, MONDAY, 6 AUGUST 2018**

**Continued from 6.7.18**

**DAY 40**

**MS R. ORR QC appears with MR M. HODGE QC, MR A. DINELLI and MS E. DIAS  
as Counsel Assisting with MR T. FARHALL  
MR N. YOUNG QC appears with MR D. THOMAS, MS M. ELLICOTT and MR M.  
SHERMAN for NAB**

- THE COMMISSIONER: Before we begin, there are some things that I need to draw attention to. On 20 July, I announced that I intend to submit an interim report to His Excellency the Governor-General by 30 September. As I said then, the interim report will identify policy-related issues arising from the first four rounds of
- 5 hearings, which, as people will recall, dealt with consumer lending, financial advice, business lending to small and medium enterprises, business lending to agricultural enterprises, and issues concerning regional and remote consumers, including, in particular, Aboriginal and Torres Strait Islander people.
- 10 The intention is that those who have been directly or indirectly concerned with matters explored in the course of the hearings, as well as the public more generally, will then be invited to make submissions about how the issues that arise should best be dealt with. I must carry out the tasks that I've been given by my terms of
- 15 reference, recognising two things: first, the proper functioning of the financial services entities with which I am dealing is critical to the Australian economy. Second, because what happens in and is done by this Commission can have both direct and indirect consequences for the economy, I must deal with the matters expeditiously.
- 20 It will be recalled that I said at the first public sitting of the Commission that I understand fully that those affected by what they consider to be misconduct want their complaints recognised and considered, and want those responsible held to account. I said then and I have said more than once since, that the Commission would proceed by case studies to identify the kinds of misconduct that have
- 25 occurred, and that the Commission would not examine publicly every case of alleged misconduct. But as I have also said repeatedly, the public submissions to the Commission are very important. And every one of them – and I mean every one of them – is read.
- 30 And it is important to add that very many of those submissions have been considered repeatedly as counsel and solicitors assisting the Commission have looked at what the public have told us, to help them decide what case studies are to be examined in the course of hearings. I know that there are those that are disappointed that their cases have not been examined publicly, and every one of those persons can rightly
- 35 say that their case is unique. I know that. But it is critical to recognise that the Commission is not a court and cannot and will not adjudicate on the rights and wrongs of particular cases.
- 40 The Commission's task is to inquire, and the Commission cannot and does not make any decisions about whether those who have been affected by misconduct should have some remedy. Only the courts can make binding decisions of that kind. As I say, my task is to inquire and then to report about what I find. With all this in mind, we have tried in the first four rounds of evidence to identify from the material
- 45 provided to and gathered by the Commission, cases that, when examined in hearings, will help to identify not only the kinds of conduct that have happened, but also why the conduct occurred, what was the response by the relevant entity and by the

regulators, what should have been the response, and what recommendations should now be made.

5 Those questions about why, what was, what should have been the response and what should now be done are central to the work that the Commission will undertake after the interim report has been tabled, and we work towards preparation of a final report. They are, therefore, questions which will be important to bear in mind when preparing submissions in response to the issues that will be identified in the interim report and will be identified after the next two rounds of hearings. Now, as in  
10 previous rounds, I've considered the applications for leave to appear, and those whose applications have not been granted have been notified. And the solicitors assisting have explained my reasons for not granting leave.

15 Those whose applications were granted have told the solicitors assisting who will appear for them. There will, therefore, be no need to announce appearances. Now, Mr Hodge.

MR HODGE: Commissioner, in this fifth round of public hearings, we will  
20 examine the conduct of superannuation trustees in Australia. The purpose of superannuation is to assist Australians to save for retirement. Because of both its purpose and its size, the superannuation industry is of great significance to Australians and to the Australian economy. As at March 2018, Australians had superannuation savings comprising approximately \$2.6 trillion of assets. That is equivalent to approximately 144 per cent of Australia's nominal gross domestic  
25 product. In Australia, regulated superannuation funds are established as trusts.

The trustee holds the superannuation assets for the benefit of the members, or for the member's dependants upon the member's death. The member is the beneficiary of the trust. The trustees are obliged to act in the best interests of the members. Your  
30 terms of reference require you to consider the conduct of RSE licensees of registrable superannuation entities. We will be briefly explain what that means. There are three types of superannuation trustees in Australia. Trustees of self-managed superannuation funds who are regulated by the ATO and, as at March 2018, held \$712 billion of assets. Trustees of exempt public sector superannuation schemes  
35 who are regulated by separate Commonwealth or State legislation, and as at 31 March 2018, held approximately \$138.8 billion of assets.

And finally, trustees of APRA-regulated funds who are regulated by APRA under the Superannuation Industry (Supervision) Act or SIS Act. These trustees held  
40 approximately \$1.702 trillion of assets as at 31 March 2018. Trustees of APRA-regulated funds must be licensed by APRA, and you will hear them referred to, Commissioner, as registrable superannuation entity licensees, or RSE licensees. Hence, Commissioner, you are concerned under your terms of reference with the conduct of these RSE licensees who collectively hold on trust approximately \$1.7  
45 trillion of assets for Australians. The introduction of compulsory superannuation in 1986, coupled with the introduction of the superannuation guarantee in 1992, brought about a seismic shift in Australia's financial landscape.

That was an important change for the protection of working Australians. Before 1986, employers had a choice of how or whether to provide superannuation for their employees. In 1986, industrial awards required employers to pay three per cent of employees' wages as superannuation contributions. In 1992, compulsory  
5 superannuation was extended to all employees and employers have been required to make minimum contributions to employees' superannuation funds since then. This is known as the superannuation guarantee. Compulsory contributions are presently set at 9.5 per cent of an employee's wage or salary. That will rise to 12 per cent by 2026.

10 Superannuation now comprises around 50 per cent of total household financial assets. In comparison, accounts held with financial institutions currently comprise 15 per cent of total household financial assets. The size of superannuation assets means that superannuation is also a significant source of funding for the Australian  
15 economy. As at December 2017, superannuation was the second largest sector in the financial system by asset size, comprising approximately 29 per cent of Australia's financial institutions' assets.

20 So what safeguards are there over Australians' retirement savings? That question has particular resonance given the significance of superannuation for our national economy today, and for the financial security of all Australians in retirement in the future. The first possible safeguard is consumer oversight. Australians might protect themselves by monitoring what is happening with their super. But the available  
25 research suggests, as a general rule, that consumers do not do this and nor are they equipped to do so. The 2010 Super System Review chaired by Jeremy Cooper cited the results of a 2006 Australian Bureau of Statistics survey and said that 46 per cent of 15 to 74 year olds, or some 7 million people, would struggle to understand documentation such as job applications, maps and payroll forms.

30 53 per cent of surveyed Australians reached just the second of five levels in a practical numeracy test, while 70 per cent, about 10.6 million people, managed only to progress to level 2 in a series of problem-solving exercises. The Cooper review explained that level 3 is regarded by the survey developers as the minimum required for individuals to meet the complex demands of everyday life and work in the  
35 emerging knowledge-based economy. The Cooper review noted that a compulsory system based on informed investors making rational choices fails to confront this reality.

40 A later ABS survey in 2011 and 2012 does not show any meaningful improvement. Approximately 44 per cent of Australians aged 15 to 74 had a literacy level of level 2 or below. More than half of Australians aged 15 to 74 had numeracy skills at level 2 or below. In general, the proportion of people attaining a literacy or numeracy level of level 3 or above decreased as age increased. The Productivity Commission in its recent stage 3 draft report on competition and efficiency in superannuation has  
45 suggested, based on its member survey with 2294 respondents, that close to 60 per cent of members do not understand their fees and charges, and around 40 per cent

lack an understanding of basic investment options, such as growth, balanced and conservative.

5 The Productivity Commission suggested that broadly Australians are less financially literate in matters relating to superannuation and retirement planning than in financial matters generally. It noted that poor financial literacy often results in poor economic decision-making, and that an efficient superannuation system would enable those who lack financial literacy skills to obtain trustworthy advice and guide their choices. Australians are not, as a general rule, reviewing the performance of their  
10 superannuation fund, comparing that performance to other funds, and making rational choices as to whether they should remain with their fund or switch.

Choice, in its submission to the Commission in relation to superannuation, cited research that indicated that 50 per cent to 80 per cent of member switching is simply  
15 due to the member changing jobs or the member's employer changing default funds. Even if consumers wanted to try to make an informed choice, the information available is difficult to find and opaque. Consumers might go to a financial adviser, but if they do, as ASIC has identified in its report 562 on Vertically Integrated Institutions and Conflicts of Interest, there is a remarkably high chance if that adviser  
20 is licensed through a vertically integrated entity that the adviser will recommend an in-house superannuation product.

So the second possible safeguard of Australian's retirement savings are the regulators. There are three regulators that have a role to play in superannuation in  
25 Australia. The Australian Prudential Regulation Authority or APRA, the Australian Securities and Investments Commission, ASIC, and the Australian Taxation Office. We are concerned in this round of hearings with two of those regulators, APRA and ASIC. The ATO has a general administrative role over aspects of the superannuation system, including oversight of employer contributions. The ATO's key role,  
30 however, in relation to superannuation is to regulate self-managed superannuation funds which are not the subject of these hearings.

The responsibilities of each of APRA and ASIC in relation to superannuation are set out either in the SIS Act or in the case of ASIC, in the Corporations Act. APRA is  
35 the prudential regulator for Australia. It has described its role in a statement provided to the Commission as being:

*To promote financial system safety and stability.*

40 It describes its regulatory approach as being:

*Pre-emptive, designed to deal with issues at an early stage before they lead to adverse outcomes.*

45 We have already noted that APRA licenses RSE licensees. APRA also determines prudential standards pursuant to the SIS Act which are to be complied with by the RSE licensees. APRA undertakes supervision activities of RSE licensees to assess

5 how effectively the licensees are meeting the expectations outlined in the standards. APRA have staff, referred to as supervisors, who carry out prudential supervision. Every superannuation entity has a nominated responsible supervisor. APRA views itself as having a different approach from regulators that have mandates to enforce compliance with legislation after a violation of the legislation has occurred.

10 However, APRA is the regulator responsible for enforcing compliance with a number of provisions of the SIS Act. That includes the obligation on trustees to maintain superannuation funds solely for the purpose of providing retirement benefits. This is referred to as the sole purpose test. APRA is the only regulator given the power under the SIS Act to bring civil penalty proceedings for the limited number of contraventions that attract a civil penalty under the Act. One contravention that attracts a civil penalty is contravention of the sole purpose test. The last time APRA commenced a civil penalty proceeding under the SIS Act was in 15 2004. Judgment was delivered in 2005.

20 APRA is also the regulator given the power under the SIS Act to apply to the Federal Court for an order disqualifying a person from being a responsible person for a superannuation fund. Between February 2003 and 2008, APRA was able to disqualify a person by administrative decision without applying to the court. During that five-year period, APRA disqualified 133 people. Since 2008, APRA has been required under the SIS Act to apply to the Federal Court. It has done so once in 2013 for a disqualification order. That was against a former director of Trio Capital. The application was resolved by the director giving an enforceable undertaking to APRA 25 not to be a trustee or responsible entity of a corporate trustee for 10 years. APRA has negotiated enforceable undertakings with 13 former Trio directors.

30 The Productivity Commission in its draft report has criticised what it describes as the behind closed doors nature of APRA's supervisory activities because even if those activities curtail poor behaviour at one fund, they have limited capacity to deter poor behaviour at another. APRA, in its statement to the Commission, has rejected that criticism. It considers that its activities of publishing group letters to RSE licensees, thematic review findings, speeches, articles and other like activities to have considerable benefit in publicly addressing systemic issues. Of course, none of those 35 activities of APRA involve public enforcement action or the publicising of other action against a named RSE licensee.

40 We observe at this stage, Commissioner, and before you have heard the evidence, two things: first, it is not obvious that it is possible to separate public enforcement action from a regulator properly undertaking conduct regulation. Secondly, there may be an inherent tension between, on the one hand, maintaining stability and, on the other hand, the destabilising effect for one or more entities of public enforcement action. We will explore these issues when one or more witnesses from APRA are called at the conclusion of this round of hearings.

45 Turning then to ASIC. ASIC has jurisdiction under both the SIS Act and the Corporations Act in relation to the superannuation industry. However, that

jurisdiction is, in certain respects, limited. ASIC, in a statement provided to the Commission, has described its jurisdiction under the SIS Act as primarily limited to disclosure and complaints handling. ASICs relevant jurisdiction under the Corporations Act includes responsibility for licensing and regulating the financial sector entities that provide financial services to funds and members, overseeing the compliance of directors of corporate trustees with their statutory duties, and monitoring funds' MySuper dashboard disclosure. I will return to MySuper products later in this opening.

ASIC is not responsible for overseeing the compliance of directors with their separate obligations imposed by the SIS Act to act in the best interests of members. These separate obligations arose from amendments made in response to recommendations made by the Cooper review. ASIC has said in its statement to the Commission that if it were to have a greater role as conduct regulator for RSE licensees, then it would need to be provided with additional powers. APRA has said in its statement that it is concerned that to remove or reduce APRA's powers to regulate conduct and practices in the superannuation industry, would weaken APRA's ability to perform its mandate and achieve the outcomes that it achieves through its regulation and supervision of the industry. We will explore ASIC's approach to enforcement for matters related to superannuation when witnesses for ASIC are called at the conclusion of this round of hearings.

The Productivity Commission has also noted in its recent draft report an issue in relation to regulatory overlap between APRA and ASIC in respect of the superannuation industry. ASIC and APRA have a memorandum of understanding that was last updated in 2010. Each of ASIC and APRA have told us in their statements to the Commission about a document in preparation – ASIC calls it a relationship statement, APRA calls it an information paper – which sets out their roles. As a perhaps unfortunate illustration of the confusion between the regulators, APRA, in a statement signed on Friday, says that ASIC and APRA are in the process of drafting the paper and once it is finalised it will be published on the websites of both regulators.

On the other hand, ASIC, in a finalised statement signed on Friday, exhibits what it terms the relationship statement and says that it is due to be released soon. The relationship statement may be a matter to which we return with at least one of the regulators when they appear at the conclusion of the hearings. On any view, there is not presently a dedicated conduct regulator for superannuation trustees in Australia. APRA is, and views itself as, a prudential regulator that adopts a different approach to other regulators. ASIC considers that its jurisdiction in relation to superannuation trustees is limited.

So if consumers are unable to do anything more than peer dimly through the darkness of their superannuation trustees and there is no dedicated and active conduct regulator shining a spotlight on the trustees and searching out bad behaviour, that leaves us with the third possible safeguard of Australians' retirement savings: reliance on compliance by the trustees themselves with their duties and legal

obligations. The trustee has a statutory duty under the SIS Act to maintain the fund for the sole purpose of providing retirement benefits. The trustee has a fiduciary duty and a duty implied into the governing rules of the trust by the SIS Act to act in the best interests of members.

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The SIS Act also implies into the governing rules duties directly on the directors of a corporate trustee. But, of course, trustees are surrounded by temptation. To preference the interests of their sponsoring organisations, to act in the interests of other parts of their corporate group, to choose profit over the interests of members, to establish structures that consign to others the responsibility for the fund, and thereby relieve the trustee of visibility of anything that might be troubling. Their duties oblige them to resist all of these temptations.

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And so we have the underlying question of this module which arises from the terms of reference. What happens when we leave these trustees alone in the dark with our money? Can they be trusted to do the right thing? If they can, does that mean that the current regulatory system is adequate? If they can't, what must be done to protect Australians' retirement savings and to what extent do the entities that own or control the trustees who are not obliged to act in members' best interests, act in ways that are ultimately detrimental to members, even if they do not technically cause the trustee to breach the trustees' duties.

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We will, in a moment, summarise the issues that we will look at during these two weeks of hearings to assist you to consider and answer those questions. But before we do that, we think it will be helpful if we note two differences between the structure of this round of hearings and earlier rounds. First, there are no consumer witnesses in this round of hearings. That reflects the nature of the matters that we are investigating. The conduct and decisions with which we are concerned are unobserved and unobservable for most Australians. The conduct of a trustee might affect Australians' financial position in a significant way by reducing the returns earned on their superannuation and, therefore, the amount available in retirement.

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But that is a difficult, if not impossible outcome for most people to detect. At the end of your working life, you know how much you have. You do not know how much you might have had but for certain decisions made by your trustee of which you were not aware or of which you were only notified in an obscure way, if at all. Some members of the public have identified things that are amiss with their superannuation and raised this in public submissions. As at Friday, the Commission has received 7961 submissions via its web portal. 1244 of these submissions were identified by the consumer as relating to superannuation, comprising 15.6 per cent of all submissions received.

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Some of the key themes raised by consumers in their submissions were as follows: concerns have been raised in many public submissions about fees for financial advice, management or administration that have not been disclosed to the consumer or resulted in any service being provided. Two examples include a fund commencing charging ongoing management fees without adequate explanation after

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three years of these fees not being charged, and inappropriate fees charged by financial advisers, including a consumer who was charged adviser fees despite having taken out the superannuation policy directly with the superannuation company in the absence of a financial adviser.

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Submitters also raised concerns about the provision or supposed provision of insurance by superannuation funds which have not been sought by the member. Submitters complained about the complexity of superannuation, particularly in respect of insurance policies that are included as a default in superannuation products. As an employer will generally determine an employee's default superannuation product this process can be confusing for young people entering the workforce for the first time or people from non-English speaking backgrounds. These consumers are unaware of which insurances they have been signed up for within their superannuation and whether they are able to opt out.

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The second difference between this round of hearings and earlier rounds is that we will deliver an oral closing at the conclusion of these two weeks, but that closing will not address in detail the specific findings that we submit are or may be open to you in relation to specific entities. Rather, the oral closing will provide for you a summary of the types of policy issues in respect of which submissions are sought, and the possible general findings that we will submit are open to you and give rise to these policy issues. We hope that will assist both parties being given leave to appear and other people interested in the policy issues to begin formulating their submissions to you on those issues.

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By the end of the following week, that is by 24 August 2018, Counsel Assisting will provide you with written submissions that address specific findings we submit are or may be open to you with respect to the entities the subject of case studies, together with a written articulation of the policy issues. The provision of those written submissions will mark the formal close of round 5. Commissioner, having explained those differences, we now want to outline some things about our approach to investigations for this round of hearings.

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The Commission has published three background papers for this module. Background paper number 22 on superannuation prepared by the Royal Commission, background paper 23, an overview of key regulatory reforms in superannuation prepared by Treasury, and background paper 25, on the legal framework governing aspects of the Australian superannuation system prepared by Professor Pamela Hanrahan. We have received submissions from some interested groups, including the Association of Superannuation Funds of Australia, the Australian Council of Superannuation Investors, the Australian Institute of Superannuation Trustees, the Financial Services Council, the Financial Services Institute of Australasia, and the Responsible Investment Association of Australia.

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We have also received submissions from bodies which assist consumers in relation to their dealings with superannuation entities, including the Consumer Action Law Centre and Choice. We sought responses from ASIC and APRA to various inquiries

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we had in relation to superannuation, and their regulatory issues or concerns, and we met with representatives from each regulator and they provided very helpful assistance in identifying some matters of concern. We have had one background meeting with the Productivity Commission during the course of the preparation of this round of hearings.

As you know, Commissioner, the Productivity Commission published in May its draft report on stage 3 of its assessment of the Australian superannuation system. Your task necessarily involves a significant difference in approach to that of the Productivity Commission. The Productivity Commission begins with and is concerned by system-wide outcomes. Your task in this round begins with the question under your Letters Patent with the question of whether a trustee or somebody with any connection to a trustee has engaged in misconduct or conduct falling below community standards and expectations, or has used retirement savings for a purpose that does not meet community standards and expectations or is not in the best interests of members.

Your task necessarily begins with a focus on particular entities. You must then consider the contributing causes to such conduct and what recommendations you might make to address such conduct and the causes. We are focused on the flow of money into and through the trustees, the use of the money by the trustees, and the governance of trustees dealing with the money. The draft recommendations of the Productivity Commission are of interest to us insofar as they might address any problems that are identified during the course of this round, and we will discuss them in closing.

However, we must begin, in accordance with your terms of reference, with the conduct of specific trustees or those connected with them, and then extrapolate to the general. Having said that, the funds that we have chosen represent a very significant proportion of funds under management within the Australian superannuation system. We are concerned under the terms of reference with the trustees of APRA-regulated funds. As at 31 March 2018, there were 132 such trustees licensed by APRA and they held approximately 65 per cent of total superannuation assets. These RSE licensees are trustees of two types of funds: large APRA funds which have more than four members and small APRA funds which have four members or less.

As at March 2018, the 132 RSE licensees were the trustees of 205 large APRA funds, and 2085 small APRA funds. We have focused upon large APRA funds in this module. These large APRA funds can then in turn be split into four categories: corporate funds of which there are 24 funds holding \$54.7 billion in assets. These are not for profit funds and are arranged by an employer for its employees. Public sector funds, of which there are 18 funds holding \$443.4 billion in assets. These are also not for profit and cater to government employees. Industry funds, of which there are 40 funds holding \$598.8 billion in assets. These are not for profit and in a few but limited cases may only be open to employees in particular industries. However, many, including all of the funds that we will consider in this module, are now open to the public.

Finally, retail funds, of which there are 123 funds holding \$602.6 billion in assets. These are for profit funds. These funds are usually run by banks and investment companies and generally have a large number of investment options. This round of hearings will focus on retail funds and industry funds. As at 31 March 2018, both  
5 industry and retail funds each held around 35 per cent of the assets of APRA-regulated funds. As at the end of the 2017 financial year, three of the five largest superannuation funds were AustralianSuper with then \$123 billion under management, MLC Super Fund with then \$77 billion under management and Colonial First State FirstChoice Superannuation Trust with then \$72 billion under  
10 management.

All of these funds have grown since 30 June 2017 and all will be the subject of consideration in this module. As at 30 June 2017 of the 168 superannuation funds whose reporting date was 30 June, and asset size had been published by APRA, only  
15 34 funds, around 20 per cent, held assets of over \$10 billion. But these 34 funds held around 83 per cent of the superannuation assets published. In selecting trustees for examination during this module, we took the information we gathered from various sources and came up with a long list of trustees for examination. You issued compulsory notices to approximately 50 trustees, some of whom operate a number of  
20 funds, seeking production of the last five years of board papers and other documents.

We sent rubrics to approximately 40 trustees asking the trustees to voluntarily provide us with substantial amounts of background information. We received very substantial cooperation. From there, we progressively narrowed down to focus on,  
25 excluding QSuper, the final 13 trustees, or groups of trustees in a couple of cases, for this module. We should make two final observations about that process. First, is an observation about the nature of the conduct that we considered raised sufficient questions to warrant consideration during the oral round of hearings as to whether that conduct is misconduct or conduct falling below community standards.

30 As we have already indicated, you have issued many notices for this round, and those notices have produced many documents for the Commission to review. For both retail and industry trustees, you have required production of many types of board and committee packs and internal documents. For certain industry funds you have  
35 required production of credit card statements for credit cards used by any member of the board, the chief executive officer, or any senior member of management of the trustee, production of documents from sponsoring unions and employer or employer organisations, and production of documents from various companies forming part of the group of companies owned by industry super holdings.

40 On the whole, it is our view that the Commission's review of documents identified fewer examples of types of conduct of the industry fund trustees that raise questions warranting oral consideration as to whether the conduct is misconduct or conduct falling below community standards or inappropriate use of retirement savings when  
45 compared with that of the retail funds that will appear in this round of hearings. In a number of cases, though certainly not all, the conduct of the industry funds which we have identified as warranting consideration during the oral hearings, is very nuanced.

Secondly, we will not be considering conduct that is presently the subject of litigation before the court. Let us give two examples of such conduct. We will not be considering the allegations about the selling practices of BT Westpac that are presently the subject of a reserved decision in the Federal Court. We will also not be  
5 considering the allegations in an unfair dismissal case against AustralianSuper. Commissioner, we will now give an overview of the issues that we will explore during this round of hearings to assist you in answering the questions that we have identified.

10 Since publishing the précis, Counsel Assisting have decided that we will tender the statements from United Super, better known as CBUS, but will not call witnesses from CBUS to give oral evidence. I will, however, summarise the evidence of  
15 CBUS with respect to two of the issues that we are interested in exploring, as I come to them. For the 12 trustees or groups of trustees, that is excluding QSuper, the examination of their witnesses will consider one or more topics falling within the following three main groups. First, the ways in which trustees or their related  
20 entities seek to cause members to join or stay with their fund. Secondly, trustees monitoring of the use and performance of members' funds. Thirdly, the structural and governance arrangements that exist for trustees.

In many cases, an issue in one group will lead inevitably to an issue in another. For example, retail fund trustees permit the payment of grandfathered commission to financial advisers. The payment of commission may cause those members to be kept  
25 in the fund and that is a topic from the first group. That will then lead inevitably to a question from the third group about the structural arrangements of the trustee and whether they are sufficient to monitor advice being provided to members of the fund and paid for out of the superannuation assets by the trustee.

Commissioner, within the first group concerning the ways in which trustees or their  
30 related entities seek to gain or keep members, we particularly draw your attention to the following four topics. First, the selling practices of banks in relation to the superannuation products offered by their related party trustee. Stricter consumer protection laws apply to banks as holders of financial services licences when their  
35 representatives give personal advice about complex financial products such as superannuation. This includes the requirement to act in the customer's best interests. Personal advice is advice given to a person in circumstances where the provider of the advice has considered one or more of the person's objectives, financial situation and needs.

40 In July of this year, ASIC accepted court enforceable undertakings from the Commonwealth Bank of Australia and the Australia and New Zealand banking group pursuant to which those entities have agreed to change the way they distribute superannuation products to their customers through their bank branches. ASIC  
45 observed a common practice of offering those products to customers at the conclusion of a fact-finding process about customer's overall banking arrangements. ASIC was concerned that the proximity between the fact-finding process and the discussion about the product was leading branch staff to provide personal advice to

customers about their superannuation when they were only authorised to provide general advice, and also that customers may have thought, due to the proximity of the fact-finding process to the offer of the product, that the branch staff were considering risks specific to the customer when this was not in fact the case.

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These court-enforceable undertakings prevent CBA and ANZ from distributing the relevant superannuation products in conjunction with the fact-finding process. CBA and ANZ were also required to each make a \$1.25 million community benefit payment. There was no remediation. We will explore this conduct and the giving of the enforceable undertakings with CBA, ANZ and ASIC. Second, the making of payments by industry funds to their sponsoring organisations or affiliates of the trustee to assist, or purportedly to assist, with the marketing of their funds. By sponsoring organisations, we mean the organisations that own the shares in the trustee or are associated with those owners.

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This was an issue in respect of which we sought evidence from CBUS. CBUSs shareholder organisations are Master Builders Australia, the Construction, Forestry, Mining and Energy Union, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union, the Australian Manufacturing Workers Union and the Australian Council of Trade Unions. Like many industry funds, CBUS has partnership agreements with many of its shareholder organisations including both trade unions and employer organisations. In 2015, a review by KPMG identified that United Super had paid over \$7 million to its shareholder organisations over five years, but there were no formal processes or requirements to track whether the agreed benefits had been delivered.

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Following delivery of that report, United Super introduced a number of process changes and engaged an independent consultant to review the benefits of the agreements. The result was a revised industry partnership strategy and evaluation model which measured a range of variables and made an assessment of the overall value of each partnership, whether with a shareholder or other industry organisation, to United Super. The model was first implemented in the 2017 financial year. Our review suggests that although some of the assessment is necessarily subjective, and it is not clear whether the model is rigorously applied in all instances, the model provides a considered framework by which United Super can assess whether its arrangements with shareholder organisations are in the best interests of CBUS members.

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However, although we will not explore this issue with CBUS, we will explore the issue of payments to sponsoring organisations or affiliates with other industry funds that will appear during this round of hearings. It is particularly important that such payments be carefully monitored because of the obvious potentials for conflicts of interests. The third topic within this group is the continued payment of grandfathered commissions by retail funds. None of the industry funds that we have reviewed were paying commission. However, save for Mercer, the major retail funds in respect of which you will hear oral evidence are all, five years after FOFA came into effect, paying very substantial amounts of commission.

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You may very well wonder, Commissioner, how the payment of commission to financial advisers could be in the best interests of members of superannuation funds. You may also wonder how the payment of commission satisfies the sole purpose test. The fourth topic in this group we will consider is the approach of trustees to  
5 members who have multiple superannuation accounts, either within the same fund or in a different fund. As at 30 June 2017, over 14.8 million Australians had a superannuation account. Despite attempts in recent years to encourage Australians to combine their superannuation accounts, the percentage of employees holding only one superannuation account increased only slightly between 2013 and 2016 from 55  
10 per cent to 60 per cent.

That is to say, 40 per cent of Australians continue to hold more than one account. The multiplicity of accounts gives rise to significant concerns about duplicative administrative costs and also the significant cost of multiple insurance policies that in  
15 some cases will not all be able to be answered. There is no doubt that insurance and superannuation can be of value to individuals. However, the insurance premiums deducted by the fund trustees from member accounts are also a key driver of balance erosion and can reduce low income earners' retirement balances, particularly when coupled with the high prevalence of multiple accounts.

20 Of people with insurance in superannuation, over 20 per cent or around 2.5 million people have two or more accounts with insurance cover. One way in which the government has sought to address the problem is by legislation dealing with lost accounts. Circumstances in which a member is a lost member include where the  
25 member is uncontactable or the member is inactive. A member is uncontactable if various conditions are satisfied, including that either the fund never had an address for the member, or the trustee has attempted to contact the member in writing at the last known address, and a trustee believes, on reasonable grounds, that the member can no longer be contacted at any address known to the fund.

30 A member is an inactive member in circumstances in which they have been a member of the fund for longer than two years, and they joined the fund as a standard employer-sponsored member, and the fund has not received a contribution or rollover for the member within the last five years of their membership of the fund.  
35 However, even if inactive, a member will not be deemed lost if within the preceding two years, the fund has verified that the member's address is correct and has no reason to believe that the address is now incorrect, or the member is permanently excluded from being a lost member because they have indicated, by a positive act, that they wish to continue being a member of the fund, or they have contacted the  
40 super provider at any time after they joined the fund and indicated that they wished to continue being a member of the fund. We will return to that carve-out in a moment.

45 The government has recently proposed further legislative changes to attempt to address these issues. In the 2018/19 budget, the government announced that it would legislate to ensure that cover is offered on an opt-in basis for accounts of members below the age of 25, inactive accounts that have not received a contribution in 13

months where the member has not elected to retain existing cover, and low balance accounts below \$6000. It is estimated that around five million individuals will have the opportunity to save an estimated \$3 billion in insurance premiums by choosing to opt in to this cover rather than paying for it by default.

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The reforms also include a ban on exit fees for all accounts designed to benefit the many Australians who want to roll over their superannuation accounts to a different fund or access their superannuation. Exit fees cost members \$52 million in 2016/17. The reforms will also make changes with respect to inactive low balance accounts, accounts which do not have insurance cover, have balances below \$6000 and which have not received a contribution or rollover for 13 months will be transferred to the ATO to protect them from further erosion. For the first time, the ATO will be empowered to proactively reunite these account alongside lost superannuation it already holds with a member's active accounts where that is possible, thereby boosting their balances at retirement.

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Together, the government expects that these changes will send \$6 billion of superannuation back to three million Australians in 2019/20. We, however, are concerned with how trustees are dealing with the current regulatory regime. We will examine whether trustees are acting in the best interests of members in circumstances in which they know that they have members that have multiple accounts within the same fund. We will also examine the conduct of trustees who take steps that stop a member's account being classified as lost, and thereby avoid the obligation to transfer the account to the Commissioner of Taxation.

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Commissioner, the second group of topics is concerned with monitoring of the use and performance of member funds. We draw your attention to six topics in this group. First, the payment for financial advice or other services from the assets of the fund. Consumers can receive advice regarding their superannuation from a financial adviser independent of their fund or through the fund so long as the advice concerns the preservation of their retirement benefits. ASFA notes that it is relatively common for the bulk of costs of scaled advice to be covered by general administration fees charged to members by funds, or a combination of a general administrative fee and a specific fee for the service provided.

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By contrast, the costs of providing full personal advice are recovered by a specific fee linked to the account of the member receiving the advice. Retail funds expend relatively more on financial advice paid for by members than other types of superannuation funds. The payment for such advice has given rise to a substantial number of fees for no service issues. Some of those were addressed in round 2. We return to them here from a different perspective. In round 2 we considered these issues from the perspective of the providers of financial advice. In this round we consider fees for no service from the perspective of the so-called product manufacturer. That is, in this case, the superannuation trustee.

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In this respect, a number of trustees the subject of this round of hearings have admitted misconduct or possible misconduct concerning fees for no service in

submissions or witness statements provided to the Commission. AMP, CBA and IOOF have acknowledged fees for no service conduct that we believe must have affected the trustee or trustees of the superannuation fund within their respective retail groups, though they may not have made that specific link in their submissions.

5 NULIS Nominees, owned by the NAB Group, acknowledged in its submissions that it has engaged in conduct that it characterised as misconduct or conduct falling below community standards and expectations in relation to superannuation.

10 Statements from NULIS witness have also been provided to the Commission. In its submissions, NAB acknowledged between September 2012 and January 2017 approximately \$35 million in plan service fees were incorrectly charged to 220,460 members and deducted from their accounts where they either did not have a plan adviser linked to their account – I’m sorry, where they did not have a plan adviser linked to their account. NAB also acknowledged that the correspondence issued to

15 these members also potentially misled members by not disclosing that PSFs would be charged or that members could opt out of PSFs. As at June 2017, approximately \$35 million had been repaid to 220,460 affected customers.

20 In a statement provided to the Commission, NULIS also acknowledged that it had announced on 26 July 2018 that it would stop deducting a plan service fee from the MLC MasterKey Personal Super accounts from 30 September 2018. It acknowledged that it did not clearly communicate to those members that they could opt out of this fee if they no longer wanted to access the general advice. As a result of this conduct, approximately 205,000 current MasterKey Personal Super members

25 will be refunded the plan service fees they paid whilst in this product. NULIS, in a statement to the Commission last week, estimated that approximately \$87.1 million in refunds and other compensation to these members will be paid.

30 ANZ owns OnePath at Oasis Fund Management. ANZ acknowledged in its submissions that from 2003 to 2015 certain OnePath entities continued to deduct adviser service fees from the accounts of about 2900 members of managed investment scheme and superannuation funds after these accounts ceased to be allocated to an adviser. The total fees incorrectly deducted were \$931,647.56. The incorrect deductions were not remitted to any adviser. These breaches were reported

35 to ASIC and APRA. ANZ has reimbursed customers for the incorrectly charged fees together with interest. No reimbursement or compensation was made to 255 affected customers who suffered financial effects of \$20 or less and who had exited the relevant managed investment scheme or fund. Amounts not paid to customers in these circumstances were paid into the relevant fund.

40 In addition, two entities that are not the subject of oral case studies acknowledged fees for no service conduct. The Westpac group owns BT Funds Management. BT offered Asgard products. Westpac acknowledged that some customers of the Asgard products continued to be charged advice-related fees which were retained by the trustee when they ceased to be advised by financial advisers and the trustee should

45 have ceased charging those fees. Westpac identified that 767 accounts were affected. As a result of the identification of the issue, customers were remediated \$634,490 in

aggregate, comprising reimbursement of the fees incorrectly charged and compensatory interest.

5 The other entity is StatePlus. In 2016, the trustee of First State Superannuation Scheme acquired State Super Financial Services Australia Limited, the trustee of StatePlus Superannuation. A review of the StatePlus business practices and service provision to members was initiated soon thereafter. That review detected that a group of members of StatePlus had paid for advice as part of their management fees but those members had not been provided the relevant advice. ASIC was notified in 10 May 2017. Since then StatePlus has engaged with ASIC and formulated a remediation plan for the 46,534 members affected. It is anticipated that member remediation is to be concluded this month and a total amount of \$92 million is said, in a statement filed with the Commission, to be more than sufficient to cover all project expenses and fee repayments.

15 The second topic in this group is the ways in which funds monitor the performance of the products that they are offering and how they engage in performance attribution. Performance attribution is the explanation for why the performance of a product differs from the benchmark for performance. We will consider this 20 specifically in relation to MySuper products. We will also examine AustralianSuper's monitoring and management of its indirect investment in Pacific Hydro through a fund managed by Industry Funds Management.

25 Third, related to the preceding topic, we will consider the way in which trustees go about carrying out their statutory obligation to perform an annual MySuper scale test. There are a few concepts, Commissioner, that I ought to explain in relation to that, beginning with MySuper. The introduction of MySuper products was a recommendation of the Cooper review. MySuper products are designed to have a simple set of product features suitable for members who do not necessarily actively 30 engage with their superannuation. Legislation restricts the types of fees that can be charged on MySuper products, and limits the investment options that are available to either a single diversified option or a life cycle option.

35 All MySuper products must also contain life and permanent disability insurance on an opt-out basis with some exceptions. No commissions can be paid on MySuper products. APRA must authorise the trustee of a superannuation fund to offer a MySuper product and most funds can only offer one MySuper product. MySuper products are default products. If a person cannot or does not choose their superannuation fund, an employer is required to make the superannuation 40 contributions for the employee into a default superannuation fund selected by the employer.

45 Since 1 January 2014, an employer must select a fund that offers a MySuper product, and default contributions must be paid into the MySuper product unless an investment choice has been made. As at 31 March 2018, there were 92 superannuation entities that offered 107 MySuper products. Six entities offered more than one MySuper product. As at 30 June 2017, 56 per cent of accounts were

MySuper accounts. Almost all of that 56 per cent arose from default fund arrangements rather than being chosen by members. However, when looking at the amount of money each account holds, the majority of superannuation money, around two-thirds, is placed in choice products rather than MySuper products.

5

As at 30 June 2017, industry funds had the highest proportion of MySuper member accounts, comprising approximately 86 per cent of all industry fund accounts, and MySuper member benefits, approximately 65 per cent of all industry fund member benefits or assets, as well as the highest number of members who had chosen to remain in a MySuper product. Under section 29VN of the SIS Act, a trustee of a fund that includes a MySuper product must determine on an annual basis whether the members holding the MySuper product are disadvantaged when compared with the beneficiaries of other funds, because of the scale of the MySuper product that they hold. We will consider how the funds go about making that annual determination.

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We should also note that in December 2017, APRA released a new prudential standard for consultation which proposed changes to the assessment of outcomes for members of registrable superannuation entities. The new prudential standard would apply to all RSE licensees and require annual assessment of the outcomes provided to members using a broader range of measures. If, when undertaking the outcomes assessment, an RSE licensee determines that changes to its operation would likely improve outcomes for beneficiaries, the RSE licensee must assess the costs and benefits of implementing those changes and where that cost benefit analysis supports doing so, the RSE licensee must reflect those changes in its annual review of its business plan. But that outcomes assessment is not one that is presently in effect.

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The fourth topic in this group is the transfer of accrued default amounts to a MySuper product. As we have said, from 1 January 2014 a trustee was obliged to attribute all default contributions to a MySuper product unless an investment election had been made. However, a member of a fund may have already had superannuation contributions in a default product before 1 January 2014. Those existing amounts are called accrued default amounts or ADAs. ADAs might, if they are in a retail fund, be subject to higher fees than contributions in the MySuper product. ADAs might, if they are in a retail fund, be subject to trailing commissions, whereas no commission can be paid on MySuper products.

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The transitional provisions required trustees to transfer all ADAs to MySuper products by 30 June 2017, but, of course, trustees could transfer ADAs to MySuper products at an earlier date. You will need to consider, Commissioner, whether you would expect that trustees acting in their members' best interests would transfer members' ADAs to MySuper as early as possible. There was, we note, a marked difference between when industry funds, as a general rule, transferred their ADAs to MySuper products and when the retail funds did so. The question for you will be whether the delay in those transfers was in the members' best interests.

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The fifth topic in this group is the consideration of cash returns by certain retail funds. As is well known, some retail funds in Australia are providing very low

returns on cash. We will examine what the reasons for this might be. The sixth topic in this group is spending on marketing and advertising by industry funds. We will look at two particular examples: The New Daily and fox and hen house. The New Daily is an online publication that was originally funded by a group of industry funds and was then transferred to Industry Super Holdings.

It might be useful at this point, Commissioner, for us to just say something very briefly about the structure of Industry Super Holdings. Industry Super Holdings is a company owned by a number of industry funds. AustralianSuper is the largest shareholder in Industry Super Holdings, followed by CBUS, HESTA and Host-Plus. Industry Super Holdings owns various entities that provides services to the industry funds. For example, Industry Fund Services Proprietary Limited is a subsidiary of ISH which provides financial advice to industry fund members.

Industry Super Australia is also a wholly owned subsidiary of industry super holdings. ISA provides research, policy development, government relations, advocacy and promotional services for industry super funds. A number of industry funds pay quarterly contributions to fund the services provided by ISA. One particular campaign of ISA that attracted significant attention last year was an advertisement referred to as fox and hen house. The question that has arisen with respect to this ad is how it satisfies the sole purpose test. How does it maintain retirement benefits. APRA considered this last year and sought responses from two participating funds that they were satisfied that the decision to support the expense of the campaign was in the best interests of members and satisfied the sole purpose test. We will explore this issue with some industry funds.

Commissioner, the third and final group of topics is concerned with structural and governance arrangements. We will mention five topics within this group. First, the structural arrangements for the monitoring of advice provided by financial advisers but paid for out of the assets of the super fund and, therefore, subject to the sole purpose test and the trustees' best interests duties. One example of an issue in relation to the monitoring of advice given by financial advisers is advice to members to make an investment choice. The consequence of a member making an investment choice is that her or his guarantee contributions will no longer be paid into the MySuper product. Instead, the trustee allocates the contributions to a choice product.

The choice product might still attract commission under grandfathered arrangements. A financial adviser might, therefore, have an incentive to advise a member to switch to a choice product to reinstate commissions. A retail group might also have an incentive to bring about switching if the advisers are affiliated with the group. Conduct that gives rise to this type of issue was the subject of a breach notice by Aon Hewitt Limited in March of this year. It related to the conduct of two authorised representatives of Aon Hewitt Limited's wholly owned financial services entity, Aon Hewitt Financial Advice. First, during 2016 and 2017, one authorised representative had written to the clients who were members of the Aon Master Trust advising clients that their superannuation balance and future contributions would be invested in their existing AMT investment options.

If those clients wanted to deposit funds in the MySuper option, they had to contact the adviser within 30 days of the letter. The letter constituted personal advice. The authorised representative had provided no statement of advice, and had received no written directions from clients to opt out of MySuper. Second, Aon reported that  
5 another authorised representative had switched clients to choice products in the Aon Master Trust in circumstances where there were no records that the client had given informed consent to do so. We will, Commissioner, in due course, tender the statements in relation to Aon.

10 The second topic is an entity within a retail group receiving payments from third party managed investment schemes where those payments are calculated by reference to the investments of the super fund. This, Commissioner, we accept is a little complicated. We will just give one example of this. A trustee of a retail fund  
15 might invest the member's funds in a managed investment scheme operated by another entity within the retail group. That other entity – for convenience, we will refer to it here as the group investor – then invests the money in various third party managed investment schemes. Those third party managed investment schemes will probably be major investment funds of the types that most of us have heard of.

20 There may also be another agreement between the third party managed investment fund and either the group investor or a different entity within the group. That side agreement will provide that the third party managed investment scheme will pay for investments made in it by the group investor. If the agreement was pre-FOFA then the agreement will likely provide that the payments are to be a percentage of the  
25 funds invested. If the agreement is post-FOFA then it will be or likely be some dollar value. And you may recall, Commissioner, that we looked at this issue of MIS rebates to some extent during the second round of hearings in relation to platforms. It may be that a substantial proportion of the funds invested by the group investor will have been derived from the superannuation assets.

30 The question then is how, if at all, the benefits of these payments are passed back to members of the superannuation fund, given that the payments are derived from investments of the members' money. It may be, in some cases, that the way in which that benefit is passed back is by reduced fees that are ultimately charged to the  
35 members. We will consider some examples of whether the trustees dealing with these types of payments have acted in the best interests of members.

The third topic is the use of a particular structural arrangement by retail funds whereby the trustee is a dual regulated entity, or DRE. This is, as we understand it, a  
40 structure of some concern to APRA. It was the structure of Trio Capital. The structure works like this: one company is both the trustee of the superannuation fund and also the responsible entity for one or more managed investment schemes. All or most of the assets of the superannuation fund are invested by the trustee with itself in the managed investment scheme or schemes that it operates. We will consider  
45 whether the use of such a structure raises issues as to the proper management of the trustee's duty to act in the best interests of members and what dangers this type of structure might present for members.

5 The fourth topic we will consider is another potential problem with structural  
arrangements within retail funds. The outsourcing of functions to other parts of the  
retail group in a way that prevents the trustee from having any realistic prospect of  
being able to identify and monitor breaches and be satisfied that it is acting in the  
best interests of members. The fifth topic is the appointment of directors to the  
boards of corporate trustees of industry funds. There are a number of requirements  
in relation to the composition and structure of trustee boards. First, the composition  
of the boards of RSE licensees may be prescribed to ensure an equal representation  
of members and employers.

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15 Legislation introduced by the government in 2017 would, if passed, require that all  
RSE licensees have an independent chair and at least one-third independent directors.  
Second, directors along with the company secretary and senior managers are  
responsible persons of the RSE licensee and must be fit and proper according to  
APRAs prudential standard SPS 520. The standard includes requirements that an  
RSE licensee must have and implement a fit and proper policy that meets the  
requirements of this prudential standard. The fitness and propriety of a responsible  
person must generally be assessed prior to initial appointment and then reassessed  
annually and that an RSE licensee must take all prudent steps to ensure that a person  
is not appointed to or does not continue to hold a responsible person position for  
which they are not fit and proper.

25 More generally, RSE licensees are required to comply with APRA prudential  
standard SPS 510 dealing with governance. Its key requirements are that the board  
must have a governance framework which includes at a minimum the board's charter  
or equivalent document and policies and processes that achieve appropriate skills,  
structure and composition of the board, and that the board must have a written policy  
which sets out requirements relating to the nomination, appointment and removal of  
directors that support appropriate board composition and renewal on an ongoing  
basis. Many industry funds are resistant to the introduction of a legislative  
requirement that there be a minimum number or percentage of independent directors  
of the trustee. That is likely only one aspect of the issue.

35 Another issue is having a board of directors selected based on the appropriate skills  
and needs of the board. The Cooper review made recommendations to improve  
governance practices which included that trustee boards be modernised to include a  
critical mass of independent directors in line with international best practice. In  
particular, the Cooper review recommended that, at the very least, equal employer  
and member representation trustee boards should have a minimum one-third non-  
associated directors, although a requirement for a majority of independent directors  
was preferred.

45 The Financial System Inquiry, known as the Murray Inquiry, also recommended  
measures that sought to strengthen governance of the superannuation system. The  
Murray Inquiry went further than the Cooper review and proposed to mandate a  
majority of independent directors on the board of corporate trustees of public office  
superannuation funds including an independent chair. It noted that including

independent directors on boards is consistent with international best practice, aids decision-making, and holds other directors accountable, specifically in relation to conflicts of interest.

5 We will consider two aspects of this issue. One aspect is the exercise by a sponsoring organisation of its constitutional rights to replace directors in a manner that may raise a question as to whether the change of directors was in the best interests of members or detrimental to sound corporate governance. Another aspect that we will consider is whether a sponsoring organisation wishing to retain an  
10 unfettered right to appoint directors might be a barrier to a merger. Appointment of directors was the other matter in respect of which we obtained specific evidence from CBUS.

15 CBUSs board has an equal representation structure. Its shareholding bodies are entitled to appoint one director for each share held. Seven directors are appointed by Master Builders Australia and seven directors appointed by the union shareholders. The board also has one independent director appointed after a search for appropriate nominees and the chair who was nominated by the ACTU following consultation  
20 between CBUSs various stakeholders. As a result, CBUSs board ordinarily has 16 directors. At least since 2013, some within CBUS have raised concerns that the size of the board impedes its ability to carry out its functions effectively, although others within CBUS do not share or did not share that view.

25 In 2015, CBUS engaged an independent consultant to review the effectiveness of its board. This review included interviews with all board members and executive management and an assessment of whether CBUSs arrangements were consistent with better practices for a superannuation fund of CBUSs size and complexity. The review recommended that the trustee company, United Super, reduce its board size to 12 members as a high priority with a target achievement date of the end of 2016.  
30 The next year, APRA conducted a prudential review of United Super. It noted that, typically, the board made consensus decisions but that a strain to reach consensus could impede effective decision-making. It expressed concerns that the size of the board was one factor that was likely to be inhibiting to this process.

35 In contrast, United Super does not consider that the size of the board affects its effectiveness or efficiency. Nevertheless, since the 2015 report, both the chair and CEO have raised the size of the board with United Super's shareholders. In August 2017, the Master Builders Association proposed that both they and the CFMEU relinquish a board seat. As part of the proposal, an employer-nominated director  
40 appointed following an internal recommendation from United Super will be moved to the independent director position. However, the shareholders could not reach an agreement. Because no change is possible without shareholder consent, the board's size and composition remains unaltered. For this reason, rather than any considered decision of United Super, the changes recommended since 2015 have not been made.

45 As with other industry funds, the selection of shareholder-nominated directors is largely a matter for the particular shareholder of United Super. When seeking

5 nominations from a shareholder, United Super sets out any skill or experience gaps or diversity targets identified by the board. In recent years, shareholders have nominated certain directors on the basis of their skills or experience despite the candidate having no existing ties to shareholders or United Super. However, although United Super must ensure that each director satisfies legislative and regulatory requirements, it cannot require that a shareholder nominate a director having any particular experience or skills.

10 And so some directors continue to be appointed on the basis of their affiliation with shareholder organisations, not necessarily solely on the basis of their ability to contribute to the board. We will explore issues in relation to independent directors and qualifications of directors with other industry funds during oral evidence. As is apparent from the précis published by the Commission two weeks ago, QSuper will also be examined during this round of hearings. It will be examined in relation to a separate issue of the way in which RSE licensees deal with Aboriginal and Torres Strait Islander members of the funds of which they are trustees. Commissioner, that concludes the oral opening.

20 THE COMMISSIONER: If we – be –

MR HODGE: Would it be convenient to take a 20 minute break.

THE COMMISSIONER: If we come back at 11, Mr Hodge?

25 MR HODGE: Could we come back at 10 past 11, Commissioner?

THE COMMISSIONER: It's the first day, Mr Hodge. 10 past.

30 MR HODGE: Thank you, Commissioner.

**ADJOURNED** [10.52 am]

35 **RESUMED** [11.10 am]

THE COMMISSIONER: Yes, Mr Hodge.

40 MR HODGE: Commissioner, the first witness is Mr Paul Carter.

THE COMMISSIONER: Thank you. Is Mr Carter in the hearing room?

45 <PAUL ALEXANDER CARTER, SWORN [11.10 am]

**<EXAMINATION-IN-CHIEF BY MR YOUNG**

5 THE COMMISSIONER: Yes. Do sit down, Mr Carter. Yes, Mr Young.

MR YOUNG: Mr Carter, is your full name Paul Alexander Carter?---Yes.

10 Is your current business address level 4, 80 Queen Street, Auckland in New Zealand?---Yes.

And is your current position chief customer officer, consumer and wealth, at the Bank of New Zealand?---Yes.

15 And previously, from March 2013 until February 2017, were you an executive general manager within NABs Wealth Division?---Yes.

Mr Carter, have you received a summons to appear at this round of hearings of the Commission, dated 30 July 2018?---Yes.

20 Do you have a copy of the summons with you?---Yes.

Or the original?---Yes.

I tender that, Mr Commissioner.

25

THE COMMISSIONER: Exhibit 5.1, the summons to Mr Carter.

**EXHIBIT #5.1 SUMMONS TO MR CARTER**

30

MR YOUNG: And Mr Carter, have you also prepared a witness statement for this round of hearings, which is dated 30 July 2018, and which addresses a number of topics specified by the Commission?---Yes.

35

Do you have the original of the statement with you?---Yes.

Are the contents of that statement true and correct?---Yes.

40 Commissioner, I tender the statement and its single exhibit, which is in a number of folders with tabs.

THE COMMISSIONER: It's some exhibit. Exhibit 5.2, witness statement of Mr Carter, 30 July '18 and its exhibit.

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**EXHIBIT #5.2 WITNESS STATEMENT OF MR CARTER AND EXHIBIT  
DATED 30/07/2018**

5 MR YOUNG: Mr Carter, do you also have with you a working copy of your statement and the exhibit?---Yes.

Thank you.

10 THE COMMISSIONER: Yes. Yes, Mr Hodge.

**<CROSS-EXAMINATION BY MR HODGE**

**[11.12 am]**

15

MR HODGE: Thank you, Commissioner. Mr Carter, I think you explained in answer to a question from Mr Young that you were the executive general manager for superannuation and investment platforms from, I think, October 2015 to October 2016. Is that right?---That's right.

20

And then you were also the executive general manager for wealth products from October 2016 to February 2017?---Correct.

25 Are they, effectively, the same position or are they different positions?---They're very similar. In the latter role, the responsibility for the asset management business was included into my responsibility.

I see. And before October 2015, did you have any involvement in the superannuation business of NAB or MLC?---Before 2015? Yes.

30

I see. And could you just explain to the Commissioner what that involvement was?---Before 2015 – and as from 2013 I was the executive general manager of superannuation and investment platforms. My role initially was focused on what we call corporate superannuation, and then the role expanded its responsibility to also include retail superannuation.

35

I see. Perhaps if you could just distinguish for the Commissioner or explain to the Commissioner that distinction between corporate and retail superannuation?---Yes. So consistent with what is in the witness statement, corporate superannuation is typically focused on default members. In our company, brands such as Plum and MasterKey Business Super are the corporate superannuation businesses. The retail superannuation businesses are characterised by particularly distribution through financial advisers.

40

45 I see. And is it the case that you would also switch from being within the corporate superannuation area over to the retail area once you finish your employment with the relevant employer, or is that a different issue?---Sorry, can you just repeat - - -

- When you – for example, if you’re in the MasterKey Business Superannuation product?---Yes.
- 5    - - -?---Correct.
- - - Personal Superannuation?---Correct.
- 10    Are you now considered part of retail - - -?---That actually was still considered part of the corporate business.
- I see. Okay. So from March 2013 then you were involved in anything to do with the corporate superannuation business?---Correct.
- 15    Okay. And the structure of the NAB superannuation business changed relatively substantially during the course of your time there?---Yes.
- And is it fair to say one of the most significant changes was the restructuring of the RSE licensees at the National Australia Bank?---That is correct.
- 20    And just to assist the Commissioner so he understands the timing of these things, before May of 2016, the National Australia Bank had three RSE licensees - - -?---Yes.
- 25    - - - within its group. Is that right?---Yes.
- And one of those was NULIS, which is one of the things we’re going to talk about today. That’s right?---Yes.
- 30    And before May of 2016, the NULIS was the trustee for a number of superannuation funds?---Yes. I believe that’s correct, particularly the – yes.
- But they were all effectively wrap funds. Is that right?---Yes.
- 35    And then there was another trustee which was PFS. Is that right?---Yes.
- And PFS was the trustee of – you referred to Plum, the Plum brand of superannuation funds?---That’s correct.
- 40    And there were a few of those funds?---Yes, there were.
- And then there was a third trustee which was – was it MLC Nominees?---Correct.
- 45    And MLC Nominees was the trustee of at least a super fund – I’m sorry, I can’t remember the name of that super fund?---So that would pick up the MasterKey products in particular.

That was the products - - -?---Yes.

- - - within that - - -?---Yes.

5 - - - MLC one. And the way in which the MLC fund worked was that the proceeds of the fund were – had been invested in insurance policies issued by another MLC company. Is that right?---That’s right.

10 And then there was a process, I think related to when MLC sold part of its insurance business in which that was disentangled?---That’s correct.

15 And what then happened was that once you got to May of 2016, there was a process of consolidation of the superannuation entities ultimately into just one RSE licensee. Is that right?---That’s correct.

And the way in which that worked was that in about May of 2016, there was a new superannuation fund established, of which NULIS was the trustee?---Yes.

20 And - - -?---That’s the MLC Super Fund.

That’s right. Is there another one called the MLC Superannuation Fund?---The MLC Superannuation Fund.

25 Those are two different funds?---Yes, they are.

With the MLC Super Fund there are what are called successor fund transfers to move funds that had been held by PFS and also MLC Nominees up into the MLC Super Fund?---That is correct.

30 And so the products that you were referring to before, the MasterKey Business Superannuation and MasterKey Personal Superannuation, they had formed part of a fund that was held by MLC Nominees?---Yes.

35 And then there was a successor fund transfer that all of the assets of that fund went up into the MLC Super Fund of which NULIS was the trustee. Is that right?---That is correct.

40 Right. And there was also a process by which the same thing happened in relation to the PFS Plum fund?---Yes.

And I just can’t remember, did they all happen at effectively the same date, so as from 1 July 2016?---That is correct.

45 Okay. So this process of consolidation meant that from 1 July 2016 there was just one trustee operating within the NAB – one RSE licensee operating within the NAB group which was NULIS. Is that right?---Yes.

- And it was the trustee of all of the superannuation funds?---That is correct.
- But those funds were the accumulation of assets that had come from other funds that had already existed and had been operated by different trustees?---Yes.
- 5 And there were, obviously, various agreements that were entered into to provide for effectively the division of liabilities of anything that arose from pre the successor fund transfers?---That is correct.
- 10 All right. And so that the Commissioner can also understand some of the complexity of that, we've talked about funds. Within a fund there might be multiple products. Is that right?---Yes.
- 15 And a product is comprised roughly of two types of things. The first thing is that there are obviously different fees that are charged on different products?---That's true.
- And the second thing is that there are different investments that apply for different products?---Yes.
- 20 And so, for example, a product might offer a range of investment options and the member can choose into which investment option their superannuation assets are going to be invested?---Yes.
- 25 And another example is that the product might have only a single investment option and whatever funds are invested through that product will be placed into that single investment possibility?---Yes. I don't – there is not an option that we have where a product is single investment option but that is – that is possible.
- 30 Theoretically it is possible?---It is possible, correct.
- In the case of the MySuper product, is there only one MySuper investment option?---We have two.
- 35 You have two different MySuper products?---Correct.
- And, again, just to tease out the – some of the detail of this, is that a staff product and a non-staff product?---Yes. There are two MySuper products. One being the NAB group staff fund MySuper and the other the MLC MySuper product.
- 40 Yes. But those are two separate products, aren't they?---Yes, they are.
- And there's not a choice that a member can make as to how their – if their – if their assets are invested in a MySuper product they then get to make some further choice as to how those assets are invested?---Can you repeat the question?
- 45 Let me give you an example?---Yes.

With another product, you might get to make a choice that within that product you would like 20 per cent of your superannuation assets to be allocated to cash, and 80 per cent to be allocated to some – to the balanced option - - -?---Yes.

5 - - - or something like that. If you're invested in MySuper, that's not a choice that is made available to you?---No, it is.

I see?---You – you – at all times have an option to say, “I would like 20 per cent of my investment in the MySuper option.” And then it's an active choice of the  
10 member to then say I would like to move – for other investment options on the menu.

Sorry, I think we're – I think we're at cross-purposes. I don't think we're disagreeing with each other?---Okay.

15 If you're in – if you're in the MySuper product - - -?---Yes.

- - - you're not allocating 20 per cent of your investment to cash?---Correct.

20 That part of your superannuation contribution that sits in the MySuper product just goes into - - -?---That is correct.

- - - whatever is the MySuper investment decisions that have been made by the trustee?---Yes.

25 But you also have the option of placing part of your superannuation contributions into another product within the superannuation fund?---That is true.

And that's how you might choose that you want to split your superannuation 80 per cent to be in MySuper, 20 per cent in cash?---That's right.

30 But that then means you're in two different products?---Yes.

And you will be charged different fees for investment in those two different products?---Yes.

35 All right. I hope that's clear as mud, Commissioner.

THE COMMISSIONER: Better than mud, yes.

40 MR HODGE: Now, when you were originally asked to prepare the statement to come to the Commission, you had originally addressed a number of questions in relation to two groups of events. One is the PSF event or group of PSF events and the other is the ASF events?---Yes.

45 And the Commission, as I understand it, then contacted your solicitors and said they didn't think that you were the appropriate witness to deal with those events, at least after February of 2017?---Yes.

And as a consequence then, your statement no longer deals with those events at all, including pre-February 2017?---Correct.

5 But as I understand it, you were involved during your time at – as the executive general manager for superannuation and investment platforms, and also as the executive general manager for wealth products in relation to some issues that arose from those events?---Particularly the PSF event.

10 Yes. Particularly in relation to the PSF. And the PSF event was an event that arose in relation originally to the MasterKey Business Superannuation and then MasterKey Personal Superannuation. Is that right?---Yes.

15 And I think we've – I have perhaps put it too generally. PSFs were originally introduced for MasterKey Business and MasterKey Personal. Is that right?---Correct.

And the event or the issue that arose was about members who were in the MasterKey Personal product?---No.

20 I'm sorry, you think it was also in relation to MasterKey Business?---Yes. The – the event where the issues were first identified were members who were transferred to the MasterKey Business product and they were members who came from what was a previous product that was traded up called the employee – The Employee Retirement Scheme or TERP.

25 Yes. I'm sorry, I've – I understand. Again, we're going to need to now tease out for the Commissioner some aspects of this. And it might be easier if we try to do it by reference to a document. Can we bring up NAB.076.078.3319. So this – you will need to look on that screen there?---Is there – is there a hard copy that is available?

30 There is a – there is a hard copy?---Thank you.

35 So this is a memorandum to the breach review committee dated 24 November 2015?---Yes.

And this, as I understand it, would have been a memorandum sent after you had – you had assumed your position as executive general manager in relation to superannuation and platforms?---Yes.

40 And could you just explain who is Tim Jenkins?---Tim Jenkins was a product manager in the corporate super business.

All right. Did he report to you?---Ultimately, not directly.

45 Okay. And would you have been aware at the time of this memorandum – that is November 2015 – of the issue that was being taken to the breach review committee?---I believe I would have had broad awareness.

Okay. You may not have had at that stage specific awareness of exactly what was going on?---Correct.

5 Okay. And you – and I think then this is consistent with the point you were making before. If we go over to page 2 of that document. It refers to, from about a quarter of the way down the page, the TERP trade up?---Yes.

10 And the TERP trade up what – what did you say it was?---The Employee Retirement Plan.

15 Plan. Thank you. And The Employee Retirement Plan, was that a fund or a product?---It was a product.

Okay. And was it a product within – is it TUSS, The Universal Super Scheme?---Correct.

20 Okay. And so TERP was one type of product within TUSS as at 2013?---That is correct.

And MKBS and MKPS were two other type of products within TUSS?---Yes.

25 And the trade-up means that members who are members of the TERP product are being changed over into the MKBS, MKPS product. Is that right?---That is correct.

And by May 2013, the PSF, the plan service fee, had already been introduced for the MKBS and MKPS members. Is that right?---Yes.

30 So the – we will come to the – your understanding of the detail in a moment, but the particular point that you were making before is the initial incident that was of concern was TERP members who were transferred over to the MKBS, MKPS product, and the PSF fee that was then charged to them as a consequence of their trade-up?---It was a component of that fee, correct. There was a – there was a subset of members within that – within that cohort that we had concerns about.

35 All right. And the – in very broad overview, the concern was that they were unadvised members?---There was no adviser linked to their account.

40 Yes. It was within the particular computer system, they were linked to some sort of house account?---That's true.

And whereas the – I'm sorry, the consequence of that is that the PSF, instead of being paid to an adviser, was paid to MLC direct?---Correct.

45 And the concern was about whether it was appropriate that the PSF would be deducted where there was no adviser linked to the account?---Yes.

And that gave rise to the initial issue?---Yes.

Okay. And as I understand what you're saying, at about this time you would have first become aware of the issue?---I believe that's true.

Okay. And – but you weren't sitting on the breach review committee?---No.

5

Okay. I'm sorry, I tender that document, Commissioner.

THE COMMISSIONER: Exhibit 5.3 will be Breach Review Committee memorandum 24 November '15 from Jenkins, NAB.076.078.3319.

10

**EXHIBIT #5.3 BREACH REVIEW COMMITTEE MEMORANDUM FROM JENKINS DATED 24/11/2015 (NAB.076.078.3319)**

15

MR HODGE: Now, the introduction of the PSFs had occurred before the trade-up of TERP members into MKBS and MKPS?---Yes.

It had happened about a year earlier in 2012?---I believe that the original introduction of the PSF happened in September of 2012.

20

Okay. And I'm sorry, you're quite – it was – I should put that a different way. It was taken to the trustee in order to get approval in about April of 2012?---I believe that's correct.

25

And then ultimately it was introduced as at September 2012?---Yes.

And one of the things that you ultimately had to do during the period that you were executive general manager in relation to superannuation was to go back and look at the basis upon which the PSF was deducted. Is that right?---Yes.

30

And what I wanted to do then was to bring up NABs submission to the Royal Commission. I just want to understand your view in relation to this. Can we bring up RCD.0001.0034.0003. And can we go to page .0014.

35

THE WITNESS: Could I request a hard copy, please.

THE COMMISSIONER: I doubt it. Mr Carter, you will have to read off the screen?---Okay.

40

MR HODGE: If we go to page .0014.

THE COMMISSIONER: We've got 0004 rather than 0014 up. Yes, 0014.

MR HODGE: So now I hope you're able to read this, Mr Carter. You see at the bottom of the page item number 12?---Yes.

45

Is plan service fees wrongly charged to super members. And there it says, consistent with the point you made:

*MLCN –*

5

That's MLC Nominees –

*introduced PSFs in September 2012.*

10 Are you able to see that?---Yes.

Great. Then you see it explains:

*PSFs are charged for access to general financial product advice services tailored to the needs of the employees in the employer plan –*

15

And we will need to go over the page –

*and the PSF is agreed between employers and plan advisers.*

20

?---Yes.

And this appears to expand out the issue from just the TERP trade-up to anyone who was being charged a PSF. And that's – reflects what was ultimately your understanding as well? The initial discovery was in relation to - - -?---It expanded to other products where a member did not have a – a linked adviser.

25

Yes?---Thank you.

30 And if you go over to the third column, do you see the sentence that says:

*In addition, management mistakenly assumed that the PSF could be charged to members without a linked adviser for the online tools and telephone-based advice services provided.*

35

?---Yes.

Now, as we – or as I mentioned before, you in your role conducted some investigations into the basis in which the PSFs had been charged?---Yes.

40

And you looked specifically at the basis on which they were charged to members without a linked adviser?---Yes.

And bearing in mind that the PSFs were introduced in September of 2012, do you think it's accurate to say that management mistakenly assumed that the PSF could be charged to members without a linked adviser for the online tools and telephone-based advice services provided?---Yes.

45

5 And just again so I understand that, your view is that when you went back and investigated it, it appeared to you that in September 2012 management had made that mistaken assumption?---Yes. I – to be clear, I was not accountable or in that part of the business when the PSFs were designed and implemented, but upon subsequent review, that is the conclusion we reached.

10 Again, I just want to tease it out to make sure I've accurately understood your evidence. You went back, particularly in 2016, to think about a specific issue which was do we need to refund this money back to customers?---Yes.

15 And you looked at that time at various justifications for why NAB might not need to refund that money to customers?---I think a perhaps – I would rephrase that to say we were conducting an investigation to understand the issues and make sure that the right decision was ultimately made for customers.

20 All right. Well, we will come in due course to the documents. Let me just make sure I've understood, though. When you came to look at making sure that the right decision was made for customers, is one of the things that you looked at the reasons for why the PSF was charged to unlinked advisers?---Yes.

25 Sorry, to unlinked – I said unlinked advisers. To members who did not have a linked adviser?---Yes.

And you looked at, as at 2016, whether there was a basis upon which it could be said that the fee was properly charged?---Yes.

Did you also look, as at 2012, at what management had believed?---No.

30 Okay. So – and, again, this is where I just want to be clear – when you said you think that statement is accurate, that management mistakenly assumed that the PSF could be charged to members without a linked adviser, for the online tools and telephone-based advice services provided, when do you understand that management had that mistaken belief?---I believe that management had that mistaken belief when they originally put the proposal to the trustee originally.

35 In April of 2012?---Correct.

40 And the mistaken belief was that the PSF could be charged to members without a linked adviser for the online tools and telephone-based advice services provided?---Yes.

Not simply that the PSF could be charged to a member without a linked adviser?---Can you repeat the question?

45 Yes. You see, this is a – the statement here that has been put by the National Australia Bank to the Commission is a compound statement. The first part of it is that the management believed that they could charge the PSF to members without a

linked adviser. The second part of it is that that was being charged in exchange for the online tools and telephone-based advice services provided. So I just want to – again, I don't want there to be any misunderstanding as to your evidence. When you carried out your investigations in 2016, did you come to the conclusion that  
5 management, as at 2012, had mistakenly thought that they would be able to charge this PSF in exchange for the online tools and telephone-based advice services?---A statement which is a – a probably better statement is that certainly what we knew was that management felt that there was at the time an entitlement to charge the fee, and we ultimately conclude that that was not the right basis.

10 That is, you ultimately concluded that there wasn't any entitlement to charge the fee?---Correct.

Okay. Now, Commissioner, I wasn't proposing to tender that document, which is the  
15 entirety of NABs submission.

THE COMMISSIONER: But at least this section, item 12?

MR HODGE: Yes. It may have – it may have already been tendered but if we  
20 could just tender the two pages, Commissioner.

THE COMMISSIONER: Exhibit 5.4, NAB submission, pages 12 and 13, that is,  
25 NAB submission 29 January '18, pages 12 and 13. RCD.0001.0034.0003 at 14 and 15.

**EXHIBIT #5.4 NAB SUBMISSION, PAGES 12 AND 13 DATED 29/01/2018  
(RCD.0001.0034.0003 at 14 & 15)**

MR HODGE: Now, it might then help the Commissioner, Mr Carter, if we just look  
30 at what the relevant agreements are in relation to PSFs. And you've exhibited some of the agreements – or some relevant agreements to your statement. Can we bring up first tab 24 to Mr Carter's statement, which is NAB.005.762.0276. So this is the Licensee Remuneration Agreement, as it currently applies within NAB. Is that  
35 right?---I believe so.

And it's an agreement between the financial services – sorry, between the authorised  
40 representative in relation to the remuneration that's going to be paid to them by various NAB companies?---Yes.

And if we go over to the page .0280, you will see, about a third of the way down the  
page, rate of remuneration?---Yes.

I am sorry, rate of remuneration, clause 4.1. So the way in which this works is that  
45 this is an agreement providing for what the MLC payer, who for present purposes is NULIS, will pay to the relevant financial adviser?---I believe this document is in relation to commission payments.

Yes. I'm sorry - - -?---As opposed to advice fees or plan service fees.

Well, let's take that document down and then go over to number – tab 25 which is NAB.005.681.2928.

5

THE WITNESS: Sorry, which page?

MR HODGE: Sorry, it's the next tab, Mr Carter, tab 25. So this is a remuneration schedule issued by MLC Limited?---Yes.

10

And it sets out a number of fees and commissions in relation to Business Super?---Okay. Sorry, I would like to correct the previous statement. So the plan service fees were covered by the previous agreement. Thank you.

15 And if we just assist the Commissioner to try to understand what some of the fees are that apply in relation to MasterKey Business Super, the first is the adviser contribution fee?---Yes.

20 And that is a fee agreed between the adviser and the employer?---That fee would be agreed between the adviser – yes, and the employer, yes.

And there are a range of six options as to what the employer and adviser can agree is going to be that adviser contribution fee?---Yes.

25 And the highest of which is 5.88 per cent?---Yes.

Now, one of the things I was hoping you could help us with is you see how there are two columns, one is Fee Percentage and the other is Commission Percentage?---Yes.

30 Can you explain why there are those two columns, one is fee and one is commission, but they have the identical amounts there?---I believe one is indicating the fee that the customer pays, and then the amount then that the adviser receives, which are the same.

35 I think I understand what you're saying. You're saying the fee that the customer pays will be, for example, 5.88 per cent. Is that right?---I believe that's correct.

And then that – the entirety of that amount is then, what, remitted to the adviser as commission?---Correct.

40

All right. Insofar as it's a fee, can you tell the Commissioner what it's for?---The adviser contribution fee is – is best described as a commission.

45 When you say it's best described as a commission, does that - - -?---It is a commission.

And that – you’re saying that because there’s no agreement, as you understand it, to provide any service for it?---Correct.

5 All right. So this can be quite confusing, but there’s – because there ends up being two terms that NAB uses, aren’t there, for contribution fees. Are you familiar with that, adviser contribution fees and something else which is something like contribution fees for advisers. That doesn’t ring any bells for you – that’s fine. We will come to that. So this is a commission then agreed between the adviser and the employer, in your view?---Yes.

10 And pursuant to this agreement, this percentage is deducted from any contribution made, any superannuation contribution made for each employee?---Yes.

15 And this we can see is in the MLC MasterKey Business Super. But you see it says including MasterKey Personal Super. So does the adviser contribution fee carry over once an employee leaves the employment of the employer?---Yes.

20 Okay. So then when their contributions are being made into MasterKey Personal Super, there will still be deducted from those contributions this adviser contribution fee. Is that right?---Yes.

In whatever amount was agreed between the adviser and employer?---Yes, recognising that these are legacy arrangements, and no longer open to new members.

25 All right. And then you see item number 2 is Plan Service Fee?---Yes.

And it says:

30 *The adviser and employer may agree a plan service fee based on the services provided to the employer plan.*

?---Yes.

35 And:

*The plan service fee may be agreed as either a dollar amount or as a percentage of account balance.*

40 Do you see that?---Yes.

And the percentage can be up to 1.5 per cent of the employer plan’s assets?---Yes.

45 And the dollar figure can be whatever the dollar figure is per member, but up to a maximum of 1.5 per cent of the employer plan’s assets?---Yes.

And the employer plan's assets are the contributions made on behalf of the employees within the employer plan. Is that right?---I think on the plan service fee, it was on the total account balance.

5 Yes. I'm sorry, you're quite right. I used the word "contributions". The account balances of each of the employees who is part of the employer plan attracts the 1.5 per cent, or whatever it might be?---Yes.

Okay. And - - -?---Up to.

10

Up to 1.5 per cent. So the amount is whatever has been agreed between the adviser and employer. Is that right?---Yes.

15 And the amount is paid in exchange for whatever services are agreed between the adviser and the employer to be provided to the employer plan?---Yes.

And what sort of services would they typically be, do you know?---Yes.

20 What are they?---So typically, the general advice services would be onsite education, oftentimes these employers are spread across the country and advisers would provide education on superannuation, trends in the industry, general advice on the investment options that are available in the plan, insurance arrangements, and just general support services for members who are seeking clarity and greater understanding of their superannuation.

25

But not personal advice?---But not personal advice.

30 Because if we then go over to the next page, .2929, if an adviser is providing personal advice, then an adviser service fee is charged for that advice. Is that right?---It could be, yes.

I see. It's possible that they could be providing personal advice outside of the superannuation arrangements - - -?---Yes.

35 - - - and there's some direct arrangement between - - -?---Yes.

- - - the employee and the adviser. That's the point you're making?---Yes.

40 But one way in which they can do it is that it can be agreed that an amount will be debited on a regular basis from the employee's superannuation balance in order to pay the adviser for personal advice?---Yes.

And that's what is referred to as an adviser service fee?---Yes.

45 And as from 8 September 2012, if the adviser service arrangements are in excess of five per cent of the account balance, then MLC will monitor it for appropriateness. Is that right?---That is what that statement says, yes.

Okay. And if we just pause on that for a moment. Whilst you were the executive general manager for the superannuation business, was there a program for actively monitoring the provision of advice in exchange for the ASF to members of the NAB super funds?---Not to the extent it was required.

5

Okay. And that led ultimately to the ASF event. Is that right?---Yes. As I understand – as I mentioned earlier - - -

You weren't very involved?---No.

10

Okay. And then if we go over the page to .2930. So this is now the remuneration schedule but only for MKPS, that is MasterKey Personal Super. Is that right?---Yes.

And, again, we see item number 1, the same adviser contribution fee?---Yes.

15

But it says:

*The adviser contribution fee defaults to zero automatically on transfer to the MLC MasterKey Personal Super.*

20

?---Yes.

And so if there's going to be a new contribution fee, that has to be agreed between the adviser and the member if they're in MKPS?---Yes.

25

Is that your understanding of what was occurring in practice?---I have no basis to doubt that.

Okay. And then you see item number 2 is Plan Service Fee?---Yes.

30

Continuing:

*The plan service fee that applied to the members in MLC MasterKey Business Super automatically transfers to MLC MasterKey Personal Super subject to a maximum fee of .44 per cent per annum.*

35

?---Yes.

And I want to just try to understand that. So when the employee goes into the employer plan as part of MKBS, there will be deducted from their account balance a percentage for the PSF for services agreed between the employer and the adviser. Is that right?---Yes.

40

And then the member transfers over to MKPS and whatever PSF percentage has been agreed between the employer and the adviser will carry over, except that if it's above .44 per cent it will be reduced down to .44 per cent?---Yes.

45

And the member doesn't agree with the adviser to provide – for the adviser to provide services to the member?---At that point, the member is in control, as it were, they at any time – the – the adviser is – continues to be linked to their account and at any time the member with that fee disclosed is able to negotiate directly with the –  
5 their adviser that has been linked to their account. That is how the fee was designed.

That's what, sorry?---That is how that fee was designed.

Sorry, it was designed in what way? I didn't understand your answer?---The – the  
10 response to your earlier question was that fee, the member has the ability to negotiate that fee directly with their linked adviser in the personal plan.

I understand. I think we're dealing with slightly different issues. But your point is it will be possible once the member transfers over to the MKPS for the member to call  
15 up their adviser and agree on a different plan service fee?---Yes.

And presumably they could agree on zero?---Correct.

What happens if the adviser doesn't agree?---The member is – this – the member is  
20 in control, and so the member if they deem that they would like the fee to be zero, the fee will be zero.

If the member was still in the MKBS product, can the member say, "I want my PSF to be zero"?---Yes.  
25

I see. So the member could call up and say, "I don't want to pay for the PSF"?---Yes.

And they don't have to do that by contacting the adviser?---No.  
30

They could just contact MLC. Is that right?---Yes.

And if they say to MLC, "I don't want to pay this fee any more", MLC will switch it off?---Yes.  
35

And why is that?---Because the intent of a fee is that a customer is in control, and they, therefore, have the ability to turn fees off.

Now, as it turns out – and we will – there was an issue, which is the PDSs published  
40 by NAB and NULIS – actually, it wasn't NULIS – PDSs published by NAB and MLC didn't explain that. Is that right?---I think it's NULIS.

You think it was NULIS?---Sorry, prior to - - -

45 It was originally MLC Nominees and then it was NULIS?---Yes.

They didn't explain that the member could just call up and say, "I don't want to pay this fee any more"?---One of the issues that we identified was that the disclosure to members about their ability to dial that fee all the way to zero should have been clearer.

5

Because the PDSs didn't say if you just call up MLC or NULIS and say you don't want to pay that fee any more, you won't want – you won't have to pay that fee any more?---It had language along the lines of this fee can be negotiated between the member and the adviser.

10

Yes?---But we conclude that we should have been clearer that that fee can't just be – is not just negotiated but could be negotiated all the way to zero. That's one of the issues that we identified in investigating this fee.

15

You've used the word "negotiated" but there's no negotiation, is there? The member can just say, "I don't want to pay this any more"?---That's true.

20

That's one of the problems with the PDS is that it uses an expression like "negotiated" or "agreed" which suggests this is a by bipartite agreement that has to be agreed between the adviser - - -?---I agree.

So one of the problems was the PDS suggested this was something that had to be agreed between the member and the adviser, is that right?---Yes.

25

Another problem was it didn't explain that, in fact, the member could just go directly to MLC and change the fee?---That is right.

And they could change it to zero?---Yes, they could.

30

And what I'm then just trying to understand is there must be contractual arrangements that exist outside of MLC or NULIS just charging the fees, contractual arrangements between the adviser and the member and the employer?---Yes.

35

And presumably at least the initial contractual arrangement is an agreement between the employer and the adviser?---Yes.

That the adviser will provide certain services in exchange for a fee?---That's true.

40

And the fee isn't paid by the employer. The fee is paid by direct deduction from the member's account balances?---Yes.

45

And if the member says, "I don't want" – if they're in the MKBS product and they say, "I don't want to pay that fee any more", your understanding is that could just be switched off?---Yes.

And that would be switched off by MLC?---Yes.

And I think we just need to be clear about the full consequences of what you are saying. You know that an announcement was made two weeks ago by NAB and NULIS in relation to remediation of the plan service fees?---Yes.

5 And it went much further than what had been announced two years earlier?---Yes.

Because what had been announced two years earlier was the repayment of about 34 or 35 million dollars of fees, plus lost interest and earnings for members who didn't have an adviser linked to their account?---Yes.

10

And what was announced a few weeks ago was that in light of the fact that the PDSs for the MKPS product hadn't explained that the member could dial down their fees down to zero that, therefore, that would – all of the PSFs would be refunded. Is that right?---I'm afraid it relates to the issues with the subsequent events. Mr Hodge, I'm not – I'm not particularly close to those events.

15

Okay?---My – and my statement – my experience relates to that earlier phase.

20 That's fine. All right. So your understanding in late 2015, 2016 was that if a member called up and said that they wanted their PSF on their MK Business Super product reduced to zero, that MLC would just do that. Is that right?---That's my understanding.

25 And what would be the consequence in terms of the provision of services?---I think the – the consequence in terms of service is that it would not be available. I don't – I – actually I will retract the statement. I'm not entirely clear.

Sorry, not entirely clear on what, on what would happen with services?---Yes.

30 Okay. All right. But your understanding was it could just be switched off?---Yes.

And so when the customer gets transferred over to the MKPS product, now if they were paying 1.5 per cent it reduces to .44 per cent?---Yes.

35 And that will happen automatically unless they call up MLC and say, "I don't want to pay that any more"?---Yes.

40 And so then when they're in the ML – I'm sorry, the MLC MKPS product, and they're paying .44 per cent – just assume that's what they're saying – what is the service that they're receiving?---At that point that adviser would still be linked to their account. That adviser is still available at any time for those questions, and that's made aware to the member on their statement for any of the questions and the types of concerns that I discussed earlier around general advice relating to superannuation, the investment options, the – the insurance arrangements that are  
45 made available, similar sorts of questions that a member could have.

All right. So what that adviser could provide to the member is a service of being available to provide general advice. Is that right?---That's correct.

5 And in the way of these things, they would be paid the same amount and the member would be charged the same amount whether they actually provided the service or were just available to provide the service?---Yes.

10 Okay. And on the basis that the adviser was available to provide the service, MLC would keep deducting the .44 per cent from the member's MKPS product. Is that right?---Yes.

15 Notwithstanding that there's no agreement that has been entered into between the member and the adviser for the adviser to either provide services or to be paid money in exchange for being available to provide services?---Well, at that point the – the agreement with the member is with NULIS and the superannuation fund, and, as I said, at any time the member had the option to reduce the fee.

20 I understand they could call up and say, "I don't want to pay a fee any more", but if they don't do that, then originally MLC and later NULIS will keep paying the money over to the adviser?---Correct.

But there's no requirement that there be an agreement between the adviser and the member in order for that to occur?---Correct.

25 And how is it, without that sort of agreement, that MLC or NULIS could be satisfied that the payment of the fee was in the best interests of the member?---This was – it was fully – the fee was fully disclosed, as – as a deduction from the member's superannuation account, and – and that was the basis of the payment. As you alluded to before, this fee was subsequently the subject of a review by NAB, and as you point out before, these fees had been refunded to members.

Well, I think we need to be very careful about that. That's not true, is it?---Sorry.

35 You – in - - -?---The - - -

- - - two years ago or perhaps early 2017 - - -?---The - - -

40 NULIS – I just want to work through this – NULIS refunded about \$34.3 million to members who didn't have a linked adviser but had been charged the PSF?---Yes.

That's right. Then two weeks ago NULIS announced that it would now refund the fees to MKPS members?---That's correct.

45 And it announced it would stop charging those fees in September of this year?---Yes, that's correct.

All right. Do you know why it can't stop charging those fees until September of this year?---No, I don't.

5 Okay. And we will come back in due course then to look at what happened in 2016.  
Can I just make sure I've, though, fully understood the view you formed in 2016,  
which is that this fee could be deducted by then NULIS, because it was disclosed on  
the member's statement. Is that right?---For the event and the issue of the non-linked  
advisers the one that I was personally close to, no, it was broader than that. Upon  
investigation of the issue, we conclude that there was never any entitlement for – or  
10 authorisation for that fee to have ever been deducted for the non-linked members.  
And so it went beyond – our conclusion is that the issue went beyond a disclosure  
issue.

15 I understand. If we just focus for a moment, ignoring the unlinked members, on the  
continued charging of the fee after 2016, because you know it's going to keep being  
charged up until - - -?---Which one, the - - -

The PSF?---For other – for – for members who don't have – have an adviser, yes.

20 The basis upon which it's charged or – I'm sorry, I withdraw that. I will put it  
another way. The reason that in your view it was okay for the trustee acting in the  
best interests of the members to continue to charge the fee was because the fee was  
disclosed in the member statement. Is that right?---I think it would be fair to say  
that's one of – that's one of the – the bases for a fee being justified.

25 Okay. And what are – I just want to understand. What are the other reasons that  
would justify charging this fee, the PSF to members in the MKPS even where they  
have - - -?---The trustee must agree to it, that's another reason.

30 THE COMMISSIONER: Sorry, I missed the answer. Would you mind repeating  
the answer?---The trustee must - - -

35 The trustee must agree?---The trustee must agree. And the reason I make that point  
is that one of the issues that we identified with the non-linked members is that the  
trustee never explicitly agreed for the deduction of those fees. And that information  
was not presented to the trustee in the right way, which is why the fee was  
subsequently refunded.

40 MR HODGE: All right. I understand that. But my question then is concerned with  
the decision of the trustee, which is what we're interested in exploring. You're  
saying the trustee agrees to the fee and the fee can be deducted because the trustee  
agrees to the fee?---Yes.

45 Presumably, you understand the trustee has to act in the best interests - - -?---Yes.  
- - - of the members in agreeing to that - - -?---Yes.

When the trustee agrees that the PSF will continue to be deducted from MKPS members after they've transferred from the MKBS, what is the basis upon which the trustee can be satisfied of that?---Because the decision was made that that fee at that time was considered fair and reasonable.

5

For what? Fair and reasonable for what?---For the provision of that fee.

No, no, but the fee must be fair and reasonable for the provision of some services, surely?---Yes.

10

So what are - - -?---For general advice for – for as disclosed in the PDS, for general advice and support services.

For being available - - -?---Yes.

15

- - - to provide this. Okay. Now, one of the – we will come back to this in a moment. I just want to work through some consequences of the PSF. One of the things that you've addressed in your statement are the returns on cash earned by members in NAB super funds?---Yes.

20

Okay. Can we bring up NAB.005.874.0223. I am not sure – your solicitors may manage to find a hard copy?---Was this in my - - -

No, no, I don't believe it is in your hard copy. It's another statement. You see this is an annual statement to 30 June 2015?---Yes.

25

And it's the statement of a member who has invested in the MLC MasterKey Personal Super product?---Yes.

Okay. And you can see, if you look down, that the member has an opening balance of about \$43,000?---Yes.

30

And makes contributions of \$11,268?---Yes.

All right. And then if we – I'm sorry, just – that's helpful. You see that the fees paid directly from the member's account are \$929.44?---Yes.

35

And then fees rebated to the account are \$135.54?---Yes.

And the movement in investment value is \$1,013.95?---Correct.

40

Right. And then if we go over the page to page 2. Sorry, page 2 which should be .0224. Unfortunately, that's not redacted at the top. Can we just zoom in on the Your Benefits part so that we don't see the binding death nominees. Thank you. Commissioner, you've made a non-publication direction in relation to all of the personal identifying information in this. You will see that this member of the fund is 100 per cent invested in cash?---Yes.

45

This is the MLC cash fund which is actual – it's not enhanced cash, it's actual cash?---Correct.

All right. And then if we go over the page then to page 3?---Yes.

5

You can see at the top of the page the investment performance on cash?---Yes.

I have just got to wait for it to come up, I'm sorry. It's .0225. Otherwise, you can see what's going on but the Commissioner doesn't know. And you will see then this shows what the compound returns were for this cash fund. And the one year return is 1.2 per cent?---Yes.

10

And then we can see in terms of the transaction summary that there's compulsory employer contributions, but then also this member is making salary sacrifice contributions?---Yes.

15

In order to significantly enhance her superannuation balance?---Yes.

And then if we turn over the page to page 4, you will see the various fees paid in relation to this investment wholly in cash. And you see the first amount is an administration fee of \$554.32?---Yes.

20

So just even if we pause on that, our understanding is that this means that for investing in cash with a return of 1.2 per cent, you will pay on the first \$49,999 an administration fee of 1.05 per cent?---Yes.

25

And then you will see there's an adviser contribution fee debited?---Yes.

Now, just again so we can understand this, that adviser contribution fee is the fee that's debited on any contribution that's made in in some percentage. Is that right?---Yes.

30

And that's the fee that you think is a – is actually a commission - - -?---Correct.

It's not a fee at all?---Correct. This is a legacy arrangement with a commission.

35

All right. And then you see there's a – there's government levies, and the operational risk reserve cost. That's – the operational risk reserve, that is a fee that's charged – or a cost that was charged so that the trustee could build up its operational risk reserve. Is that right?---I believe that is the case.

40

And it was a mandate from APRA, I think, about requiring that there be an operational risk reserve. And then you will see there's then a plan service fee which is \$186.47?---Yes.

45

And this would be then the carry-over of the PSF from a previous MKBS plan. Is that right?---Yes.

And that fee of \$186.47, that's the fee that's being paid so that a financial adviser is available. Is that right?---Yes.

And if we go back to the first page, .0223?---Yes.

5

We can see there's a little box down the bottom which says:

*Any questions call your adviser.*

10 And it names the adviser and the telephone number?---Yes.

So that would be some external financial adviser. They may or may not be an authorised representative of NAB. I don't – you wouldn't know - - -?---Correct. The majority of these are not.

15

Are not. So then if we go back to page 4, .0226. So then that's the plan service fee. Then there's a Stronger Super implementation fee of \$65?---Yes.

20 Can you just explain to the Commissioner what that fee is?---This was only for a very short period of time. At the – at the time of the Stronger Super reforms, the – given the very significant cost of implementation, there was for particular years a strong – or a year – I can't recall – a fee associated with the implementation of those reforms.

25 To recover the cost that the trustee was incurring or the – I'm sorry, it may not have been the trustee, but to recover the cost that was being incurred by the group in order to implement the new legislative requirements?---In part. It certainly did not go to fully recover the cost.

30 I see. It cost more to fully - - -?---Yes.

- - - comply with the new legislation?---Yes.

Than the cost that was recovered?---Yes.

35

All right. And so that fee at – you may not know but that – you don't think that fee is being charged any more?---No, it's not.

Okay. And then you see there's tax credited on fees?---Yes.

40

Could you just explain to the Commissioner what that means?---It is – this is a net benefit back to the account and it's an additional – I'm sure this is about the tax effect of the fees that are – because it's a tax deduction, and that is the – basically the value of the deducted amount on the foregoing fees.

45

Is that – can I ask whether this is the issue: you see there's government taxes in the preceding box, which is contributions tax of \$1,690.20?---Yes.

So presumably, this member had 15 per cent of their new contributions paid as contributions tax?---Yes.

5 And by some deduction, it wasn't actually necessary to pay the full 15 per cent back to the government, and whatever the tax credit is then, that's rebated here?---I believe that's right, Mr Hodge.

10 Okay. And so if you ignore the tax credit, then the total fees paid from the account are \$929.44?---Yes.

But then if you include the tax credit, then the total fees paid are \$892.90?---Yes.

On an investment wholly in cash that earned \$1,013.95?---Yes.

15 And whilst you were the executive general manager in relation to the superannuation and superannuation and platforms, was it something that you considered, the level of fees being charged as against the returns on cash?---Yes.

20 Okay. And what was it that you considered?---It would have been always something that we would have been looking at as a management team to ensure that our products were competitive in the marketplace, and – and reviews of fees were an important part of that management responsibility.

25 Can you just, doing the best you can – and you may not remember any more – do you recall whether you specifically considered the net returns for members who, for example, like this member, were wholly invested in cash?---I don't recall that particular situation. Our responsibility, as you would appreciate was, I guess, across a broader – a broader set of considerations and factors.

30 Is it the case that in the MasterKey Personal Super product you get charged the same administration fee regardless of what investment options you're in?---That's correct.

35 And so if you're invested in a more risky but higher returning asset, you will be charged an administration of 1.05 per cent?---Yes.

But if you're invested in a no risk at all investment option like cash with a much lower return, you will still be charged 1.05 per cent?---That's correct.

40 And this seems like the type of thing where, on its face, no one could believe that it is in this member's best interests to remain in this product incurring these fees while wholly invested in cash. Do you agree with that?---No.

45 And why is that?---Because we don't know this member's particular personal circumstances. And there may be very good reasons why this member has chosen to be in a 100 per cent cash fund at this time. I don't know. And it will depend on individual circumstance. I think the other point worth recognising is in recent years

we are in a historically very low interest rate environment. So there would be some appreciation that the returns on cash are lower than they've been in the past.

5 But having said that, I think what you're addressing is is there a reason why this member should be wholly invested in cash. I want you to think of the question a little more broadly than that. Is there a reason why this member should be wholly invested in cash through the MLC MasterKey Personal Super product?---There could be. And this is a member choice. This member has not – by definition has not defaulted into this option. If a member has not made an investment choice they go  
10 into a balanced fund. And so this member has made an explicit choice to move 100 per cent of her assets into a 100 per cent cash fund.

She would have started in MasterKey Business. Is that right?---We don't know.

15 I see. You think it's possible that - - -?---Sorry, she would have been started – yes, that's correct.

She must have, mustn't she?---Yes, sorry. Started in the MasterKey Business Super product, yes.

20 So her MasterKey Business Super product has been moved over to MasterKey Personal?---Yes.

And she has made the choice to invest all of her money in cash?---Yes.

25 Would there be other products within MLC that she could move into where she could be invested 100 per cent in cash but have much lower fees?---No. Within MLC?

30 Yes?---There is – the – the fee structure for the cash fund is consistent. There is another product which we will call MasterKey Fundamentals which has a slightly lower administration fee than the one for the MasterKey Personal Super product, as an example.

35 If she was to call her adviser who she's paying the plan service fee to each year, would the adviser be able in exchange for that fee to tell her to move to a different MLC product?---Yes.

That wouldn't be – because the PSF is not for personal advice?---Correct.

40 So the adviser could just, without even considering her situation, say, "It's obvious that if you're going to invest 100 per cent in cash you should be in a different product with lower fees"?---No, well the adviser would be subject to all the regular advice regulations, but it is absolutely possible for that adviser to, having considered this member's situation, to advise to move to a different product.

45 I just want to make sure I've understood that, though. Isn't the point about the PSF that it's not a fee for personal advice?---Yes, for the PSF, that's correct.

So if the adviser was to consider the personal situation of the member, the adviser couldn't provide that service in exchange for the PSF?---Not personal advice. But the – but another way of thinking about that would be the adviser could – could inform the member of different options that are available.

5

Okay. And could the adviser inform the member that one of the different options available would be to move to another fund, another superannuation fund entirely not operated by the NAB group, that has – doesn't have the same types of fees on cash?---Yes.

10

I see. So that would be – again, so long as the member – so long as the adviser didn't specifically say I've taken into account your personal circumstances, the adviser could just offer this as a possibility?---Yes.

15

The problem for the adviser would be that if the adviser did that, the adviser would no longer be paid the PSF?---Correct.

I tender that document, Commissioner.

20

THE COMMISSIONER: Exhibit 5.5, MasterKey Personal Super annual statement June '15, NAB.005.874.0223, exhibit 5.5.

25

**EXHIBIT #5.5 MASTERKEY PERSONAL SUPER ANNUAL STATEMENT, JUNE 2015 (NAB.005.874.0223)**

30

MR HODGE: Do you recall at all, Mr Carter, whether there was any analysis that was performed while you were the executive general manager to identify cohorts of members like this one who is incurring high fees while being wholly invested in cash?---I don't recall.

Okay. Now - - -

35

THE COMMISSIONER: I'm sorry, the answer may be equivocal. Is it that you have no memory of what the answer is or the answer is that there - - -?---No, I have no memory.

Yes. Thank you.

40

MR HODGE: Now, as I understand it, the PSF is not a commission. Is that right?---Correct.

45

It has to be provided in exchange for a service?---It is a - - -

Sorry, it has to be paid in exchange for a service?---It is – it is – it is a fee that is paid by the member in return for access to service, and we distinguish that from a commission which is paid by a product provider, if that’s the point you were making.

5 The commission is paid by a product provider to an adviser. The adviser isn’t obligated to provide any service to a member in exchange for that - - -?---That’s correct.

- - - commission. Is that right?---Yes.

10

Okay. And what I want to turn to then is understanding how NULIS approached commissions when it dealt with successor fund transfers during your period as executive general manager?---Yes.

15 And there was at least one successor fund transfer that went through during the period when you were executive general manager?---The one that we were describing at the very start around the 30 June, 1 July 2016 was a very significant successor fund transfer when I was responsible.

20 All right. You prepared – or one of the co-authors of the papers presented to the board dealing with commissions?---Yes, I was.

And is it fair to say that the people within your team went to a substantial effort to find a way to preserve commissions?---I would frame it as part of the successor fund transfer, one of the issues was around commissions, and the team thoroughly looked into that issue.

25

All right. Can we start with NAB.005.562.0528. So this is the board pack for a joint meeting - - -

30

THE COMMISSIONER: Mr Hodge, there’s a hard copy. Can the witness have that?

MR HODGE: Yes, thank you, Commissioner.

35

THE COMMISSIONER: Yes.

MR HODGE: This is a joint meeting of the board of MLC Nominees, NULIS and PFSN?---Yes.

40

The boards were identical. Is that right?---Yes.

All right. And by this stage, you were into your role as the EGM of super and investment platforms?---Yes, I was.

45

And could you just explain who Kathy Vincent - - -?---Yes, Kathy worked directly for me. She was the general manager of our retail superannuation business.

Okay. And if we go over to page 20 of 34, it begins .0547?---Yes.

5 And this is a – I am just waiting for it to come up – thank you – so this is the covering page for a paper prepared for one of the items on the agenda of the board as at December 2015?---December, yes.

10 And you will see it's a – it's a paper that's described as Ms Vincent's paper of 25 November 2015. I think if we go over to page .0550, 23 of 34, you're also one of the – I'm not sure if the term is co-authors or co-sponsors - - -?---I would have been an ultimate sponsor of the paper.

She reports to you and you've got to sign off on the paper before it goes to the board. Is that right?---Yes.

15 Okay. And this paper is concerned with something called Project Mars?---Yes.

20 Could you just explain to the Commissioner what Project Mars was?---I believe that was the project name prior to the ultimate sale of the life company, the MLC Life company to Nippon Life and the associated work to do a successor fund transfer. That was confidential work at the time and I believe that was the project name given to that body of work.

25 Okay. And you can see what's being explained at the top of page 21 of 34, .0548, is the first part of the solution that you have explained to us already which is that there be a new super fund established, NULIS was going to be the trustee for that super fund and the Universal Super Scheme which was the fund of which MLC Nominees was the trustee was going to be amalgamated into this new fund?---Yes.

30 All right. And one of the - - -

THE COMMISSIONER: Mr Hodge, we're – the system is responding very slowly. It's not the operator, it's the system I suspect. The operator is doing his best. Yes. Go on.

35 MR HODGE: And there's then a discussion – or this paper concerns the trading-up of certain types of products, one of which is called the Ex-Aviva products and the other is the MLC MasterKey superannuation and pension Five Star products?---Yes.

40 Just taking each of those in turn, can we just deal with what the Ex-Aviva products were as you understood it?---Both of these product categories were off-sale in the sense that they were no longer open to new members. The Ex-Aviva off-sale products were those that, in a sense, were inherited from the Aviva merger or acquisition by MLC. And the Five Star products were legacy, again off-sale products that were within the MLC suite of products.

45

All right. These, though, MLC – the Five Star products, they’re a – they’re a legacy product, is that right, different from the MKPS and the MKBS?---Correct. These are closed to new members.

5 Okay. And one of the points that is made in this paper of which you are the cosponsor, is that the Ex-Aviva products don’t have any trail commission. You see about two-thirds of the way down the page:

10 *Ex-Aviv products: this group consists of 10 superannuation (nil trail commission)products.*

?---I am trying to read – this is in the – in the middle of the - - -

15 It’s in the middle of the page with .0548?---Yes.

THE COMMISSIONER: It has now popped out on to the screen. You can see the pop out and then go back to the hard copy?---Yes. Thank you.

20 MR HODGE: So they don’t have any trail commission?---Yes.

But the Five Star products, they did have trail commission?---Yes, they do.

Okay. If we then go over the page to .0549?---Yes.

25 What is – what is proposed at the bottom of the page is that the Ex-Aviva products be transferred into MKPSF which is the MasterKey super – MasterKey Personal Super Fundamentals – I am sorry, Super and Pension Fundamentals?---Yes.

30 And was that the same product you were referring to before as the Fundamentals product?---Yes.

And one of the features of the Fundamentals product is that it doesn’t have any commission. Is that right?---That’s correct.

35 So the Ex-Aviva products which don’t have any trail commission will be transferred over into the product which doesn’t have any commission?---Yes.

40 And the Five Star products which do have commission will be transferred over into the MLC MasterKey Super and Pension product?---That was the view at the time. I would note that that view has subsequently changed with management. But - - -

Sorry, which part of the view changed?---At the time this paper was written, the Five Star product was intended to be traded up to the MasterKey Super and Pension product.

45 Yes?---That particular product has commissions.

Yes?---And what has subsequently been recommended to the board is that this product get traded up to a – to a product that does not have commission.

5 I see. That's – when you say what are subsequently recommended to the board, that's still, though, when you're the executive manager. Is that right? You're talking about a decision that was made a couple of years ago?---Yes. At the point of this paper, we were recommending that the Five Star product is traded up to MasterKey Super and Pension.

10 I understand. You see under the heading Desired Future State, there's an explanation of this idea of there being the – what they call on-sale FOFA-compliant nil commission MKSPF product and the off-sale pre-FOFA commissioner-based product which is MKSP?---Yes.

15 Then it says:

*This reflects the key requirement that the new fund trustee (Successor Trustee) be supportive of grandfathered adviser commissions under FOFA.*

20 ?---Yes.

And I just want to explore with you that requirement in this paper of which you are the co-sponsor?---Yes.

25 Who was it that had that requirement?---Having reread that line, I would – I would say on reflection that that requirement read in that – so there was no requirement – there is no requirement for the trustee to be supportive of grandfather arrangements. That is a statement of fact.

30 I see. You're – notwithstanding what's in the paper, your view was there just wasn't a requirement that the new trustee needed to support - - -?---No.

35 - - - grandfathered commissions?---No. And what I am also confident of when taken in its broader context and certainly the conversations we were having with the board at the time, that was never a prescribed view for management, that there was a requirement of the trustee to grandfather.

All right. I tender that document, Commissioner.

40 THE COMMISSIONER: Exhibit 5.6, board pack MLC Nominees NULIS and PFS Nominees 2 December '15, NAB.005.562.0528, exhibit 5.6.

45 **EXHIBIT #5.6 BOARD PACK MLC NOMINEES NULIS AND PFS  
NOMINEES DATED 02/12/2015 (NAB.005.562.0528)**

MR HODGE: Now, you referred to the major successor fund transfer that happened whilst you were the executive general manager. That was the one that happened in the middle of 2016. Is that right?---Yes.

5 And could you just explain to the Commissioner what that successor fund transfer was?---Yes. The intent was to significantly simplify NABs superannuation arrangements, as was articulated at the very start of this session, there were multiple trustee entities, multiple super funds, and there was an opportunity to consolidate multiple super funds in under one trustee and in turn simplify the number of funds.  
10 That's what the program of work was to do, to significantly simplify.

And is it fair to say the most major of those SFTs was to transfer TUSS, The Universal Super Scheme, from MLC Nominees over to NULIS?---Yes.

15 All right. And TUSS was the fund that held those MKPS products. Is that right?---Yes.

And MKBS products?---Yes.

20 I think – did it also hold MKSP and MKSPF or were they in a different - - -?---No, I think they were all in there.

Okay. And the process for putting together the successor fund transfer for TUSS into the NULIS MLC fund was one that was in train in early 2016?---Yes.

25 And can I suggest that there were two issues with maintaining grandfathered commissions once the successor fund transfer went through. The first was whether it was lawful to do so under the FOFA requirements?---Yes.

30 And the second was whether or not the new trustee, NULIS, could legitimately say it was in the best interests of members to agree for those commissions to continue to be paid?---Yes.

And ultimately, when – the successor fund transfer happened. That's right?---Yes.

35 And did commissions continue to be paid once the successor fund transfer went through?---Yes.

40 Okay. And so you had to overcome those two potential challenges: is it lawful under FOFA, is it in the best interests of members?---Yes.

And – so one of the things – in order to deal with the first challenge, a lot of thinking, I take it, went into it?---Yes.

45 And the idea that was arrived at was that the movement from the TUSS into the new super fund of which NULIS was the trustee was actually a move from a platform

rather than a move from a product. Is that right?---I can't recall the specifics, I'm sorry.

5 Well, can I help you. Can I – can we bring up the document which is ASIC.0516.0001.0085. Commissioner, I – just noting the time. Can I suggest it might be convenient if – and I would have no objection – to Mr Carter being provided with a copy of this document and also a copy of the board paper which is NAB.005.562.2915, and we could adjourn for lunch now and I'm going to ask him about both of those documents after lunch.

10

THE COMMISSIONER: But give him time over lunch to look at them.

MR HODGE: Yes. If that's convenient.

15 THE COMMISSIONER: Yes. If we come back at 2 o'clock. And Mr Young, if your solicitors would be kind enough to make those documents available?

MR YOUNG: Yes, your Honour.

20 THE COMMISSIONER: Thank you. 2 pm

MR HODGE: Thank you, Commissioner.

25 **ADJOURNED**

**[12.54 pm]**

**RESUMED**

**[2.00 pm]**

30

THE COMMISSIONER: Yes, Mr Hodge.

MR HODGE: Thank you, Commissioner. Mr Carter, you've had the opportunity to look at those documents over lunch---Yes, thank you.

35

And has that helped you at all to remember the topic that we were talking about before lunch, which is the idea that NULIS or the trustee or somebody within Wealth came up with that the trustee was operating a platform and, therefore, it was possible for the members to be moved between platforms while maintaining grandfathered commissions?---Yes, I note that reference in the paper.

40

Do you remember having been involved in this issue?---Yes.

45 Okay. And I think – perhaps if we go to the relevant board paper. If we go to NAB.005.562.2915. Would it help if I gave you that doc ID again? NAB.005.562.2915?---Not 35?

5 My version says 2915. It may have been allocated a new document ID which would be inconvenient. We will try NAB.005.562.3035\_E, for extract. All right. So this is part of the board pack, again for an MLC Nominees, NULIS and PFSN board meeting?---Okay. This is – this is a different paper to the one we reviewed before lunch?

It should – let's - - -?---We were talking about grandfathering of commission.

10 Yes, you are quite right. We will just see whether – that's agenda item 6A. We're looking for agenda item 4. You've got the right paper, Mr Carter?---Yes, I do.

15 All right. While it is attempted to be found, I will just direct you to the relevant parts. If you go to the page with 24-127 at the bottom of the page. I am sorry, 24/127?---Yes.

So this is – at the bottom it shows who the relevant sponsors are of the paper?---Yes.

One of them is you?---Yes.

20 And another sponsor is Ms Vincent who we've spoken about earlier?---Yes.

She was within your team but below you?---Correct. She reported to me.

25 And then another person is Tom Garde?---Yes.

Did he also report to you?---I believe he reported to the other person referenced on the page, Matt Lawrance.

30 All right. And Mr Lawrance is the EGM of NAB Wealth Operations and Transformation?---Correct.

All right. And the paper, if we go back to page 20/127?---Yes.

35 Is titled SFT Proposal Continuation of Commission Grandfathering?---Yes.

And if we then go over the page to the page which is 21/127, it ends in .2936 with the Ringtail reference at the top of the page?---Yes.

40 You will see there's a heading about a third of the way down which is FOFA Grandfathering Rules?---Yes.

And it explains there – and I might, to assist the Commissioner, need to read out some substantial chunks of text. It says:

45 *Grandfathering provisions exist which allow for the exclusion of certain arrangements from the ban on conflicted remuneration which was introduced as part of the FOFA reforms.*

Do you see – you’ve identified that part, thank you, Mr Carter?---Yes.

Continuing:

5           *To be grandfathered, conflicted remuneration must be paid pursuant to a pre-1 July 2013 payment arrangement.*

And then it goes on to say:

10           *In addition, for the exclusion to apply, the following conditions must be satisfied: (1) the benefit must be given by a person who is not acting in the capacity as a platform operator and must (i) not be for the acquisition of a product for a client on or after 1 July 2014, and (ii) must relate at least in part to a pre-July 2014 service to the client, or –*

15

There we go. We’ve managed to find it. So if we go over three – go over to the two pages over from that page. And then blow up the section in the middle, which is:

*In addition, for the exclusions to apply –*

20

And I had just read out condition 1 but the alternative to condition 1 is condition 2 which is:

*The benefit must be given by a person who is acting in the capacity as a platform operator and must relate to a person who opened an account on the platform before 1 July 2014.*

25

?---Yes.

30           And is what happened this: that somebody came up with the idea that when the successor fund transfer was performed, it would be possible to say that NULIS was acting in the capacity of a platform operator?---I think the best way that I can discuss this whole section of the paper is that one of the requirements to – for the trustee to consider grandfathering was that it would be legally permissible to do so.

35

Yes?---And this section of the paper deals to those legal considerations. And the way I remember this is that we sought legal advice on these conditions, and the legal advice concluded that it was permissible to continue the grandfathering.

40           I take it what you are saying is the detail of how it was said to be a platform and how that would work is something that you weren’t familiar with?---Correct.

All right. You just understood that you had obtained some legal advice and the effect of that was that it was possible to say that grandfathered commission could legally continue?---That certainly – as I sit here today, that is a fair statement.

45

And there was a concern, wasn't there, about what ASICs view of this would be?---As either articulated in this paper or another one that was provided to me, we felt it was prudent, notwithstanding the fact that we had legal advice, to saying that continuing grandfathering was permissible, we thought it was prudent, in the  
5 circumstances, to proactively contact ASIC to discuss the matter, which we did. And I think the – the right response was that ASIC had no further questions of us, is – is the way in which I would describe – describe it. But, yes, we proactively engaged with ASIC on the matter.

10 Do you recall that an urgent meeting was sought with ASIC before the paper was to be delivered to the board?---I was reminded when I read the paper over lunch that a meeting was sought with ASIC, yes.

All right. And do you recall that what was sought from ASIC was that ASIC would  
15 take no action, would do nothing?---I'm not in a – I can't recall the specific request. What I can say in general terms was the – was the intent was to proactively engage with our regulator on this component of the proposal.

20 Are you familiar with the idea of a no action letter from ASIC?---In broad terms, yes.

Could you explain to the Commissioner what your understanding is of a no action  
letter?---My understanding of a no action letter is that while we were not seeking  
approval from ASIC or certainly ASIC did not provide it, nor did they express  
particular concerns. So they would – it would be the effect of noting the proposal, is  
25 – would be my understanding.

And I think you've reviewed the paper – another paper over lunch. Again, I may just  
be testing your memory to a point where it's beyond you now to remember this two  
years later. Do you remember that what NAB was doing was going to ASIC and  
30 saying, "We don't want a no action letter. We're just telling you this, but if you think you should issue a no action letter, then you could do that as well"?---I can't remember – I can't remember the specifics. What I – what I can say is the intent was proactive engagement with the regulator on the work that we were doing.

35 THE COMMISSIONER: Just to understand the work that you were doing, a successor fund transfer was to be treated as a platform transfer. Is that right?---I – I'm afraid I'm – I believe that is the implication of what we've just discussed.

40 MR HODGE: I think to be fair to the witness, Commissioner, I think what Mr Carter – I had understood him to be saying, and he can confirm, is he – the legal detail of it is not – or the particular legal structure of it is not something that he certainly can recall now. He just remembers that it was said?---Thank you.

45 You can do it. Is that a fair summary?---Thank you. That is a fair statement.

Then the second step that had to be gone through was to persuade the trustee that it would be in the interests of members to continue commissions?---Yes.

And this paper that we're looking here is the final product of the putting together of a paper to attempt to do that?---Yes.

And if we go to page .2938, which is 23/127?---Yes.

5

So we can see at the top of the page, to take up the story, that what's being reported to the board is:

10 *ASIC confirmed that it will provide no response in relation to the information provided to them.*

?---Yes.

15 Do you see that? And then the remainder of this is to attempt to explain how it can be said that it's in the best interests of members?---Yes.

And the first point that is made is:

20 *By continuing existing commission payments to advice licensees, the equivalency of members' rights and interests will be maintained.*

?---Yes.

25 Do you see that under the heading Impact to Members' Rights and Interests?---Yes. Yes, I do.

I just want to understand what that means. The point of commission is that the members don't have an entitlement to any particular service in exchange for the payment of that commission?---Yes.

30

35 So by continuing the existing commission payments to advice licensees, the equivalency of members' rights will be that they had nothing and they still have nothing. Is that right?---I think the way that I would frame the equivalency point is that the nature of the SFT, which was the subject of this paper, in no way changed pre and post those rights.

I don't think we're disagreeing. They were paying – the members were having commission deducted from their account balances, and receiving no service in exchange for it before the SFT and that would continue after the SFT?---I don't think that is a fair statement, in the senses of saying that no service was provided. What we can say is that a commission was paid before and paid after. While it's not a fee for service, it – it certainly does not mean that services were not being provided, it's just under a commission arrangement. The way in which those were paid for was different.

45

I think we need to be a bit more precise about that. The point of a commission arrangement is there's no obligation on the part of the adviser to provide the service?---That's true.

5 So I understand your point, which is it's possible that the advisers were providing some service?---Yes. Well, I would say probable.

10 Would it not make more sense to let members just agree with their financial advisers as to what services the advisers were going to provide and what payments the members were going to make for those services?---I think maybe some points of context here. First of all, MLC, as an organisation, had long championed the move – actually pioneered the move across the industry from moving from commissions to fee for advice models. So at an overarching level, Mr Hodge, I agree with your statement. We wanted to move progressively more businesses and advisers to those  
15 types of arrangements. The conclusion of this particular paper was there was an SFT that was under consideration. We knew that the benefits of the SFT, if done, were going to be significant to multiple stakeholders, including members. Just through the sheer simplification of the entity structure, amongst many other things. So having established the fact that it was permissible to continue, we felt – well, the proposal to  
20 the trustee was that it was – it would be in members' interest to allow the commissions to continue, and then get all the other benefits associated with the SFT.

25 Do you agree with me that you could do the SFT without grandfathering commissions?---And we considered those options in the paper, yes.

You agree that that is possible?---Yes.

30 So the benefits of the SFT, which are about scale and efficiency and cost savings and things like that, they could all be obtained without having to grandfather commissions?---They could.

So those benefits have nothing to do with the decision as to whether or not to grandfather commissions?---I understand your point.

35 Well, do you agree? Those benefits have nothing to do with whether or not to grandfather commissions?---I don't – I don't think it's any relevant consideration, because this was a decision to say we – we want the SFT to happen, and the options which would have better benefits to members, a subset was then do we in that context continue commissions, to obtain the benefit, or not. And we conclude that it  
40 was in the members' interest to allow the continuation.

THE COMMISSIONER: I just don't understand that, Mr Carter. You're going to have to explain it a lot better?---Okay.

45 MR HODGE: Perhaps you could try by articulating what the benefits to members are of continuing commissions?---What we concluded in the paper is that if the commission arrangements were cancelled, that would, in effect, have the result of a

breach of contract by the trustee with its – with advisers. If that happened, it is also highly likely that advisers and the amount of assets in the fund would be reduced because it is – the advisers that we were dealing with would be dissatisfied that NULIS had knowingly breached a contract to continue paying commissions, and it's  
5 in that context that the trustee agreed that by continuing grandfathering and not having clients move elsewhere and funds – funds maintaining in the super fund, and that was ultimately in the best interest of members.

Let's take those propositions in turn. NULIS didn't have any contractual  
10 arrangement with the advisers, did it?---Yes.

It was a different MLC nominee – or MLC company that had contractual arrangements?---Yes, at that time, yes.

15 Is that right?---Yes.

In fact what was happening was that NULIS was going to take up new contractual obligations in order to be able to make these grandfathered payments?---That is true.

20 All right. So it can't be that NULIS would have breached any contract by refusing to continue commissions?---That is true.

Okay. And this is a decision that we're talking about of NULIS?---Yes.

25 Is there some suggestion that NULIS ought to take into account the interests of other members of the MLC Group?---Can you clarify your question?

Is there any suggestion by you that NULIS, in deciding what's in the best interests of members, ought to take into account the interests of the other members of the MLC  
30 group?---No.

Okay. So we can disregard any issue about breach of contract. Do you agree with that?---For NULIS, yes.

35 And this is a decision of NULIS?---Yes. Thank you.

And, in fact, just in relation to that, isn't it the case that under the adviser agreements, it's possible for the relevant MLC nominee to terminate the agreement by giving 30 days' notice?---I'm – I'm not – I can't confirm that to be true.  
40

Is there anything in this paper that explains or positively asserts that there would be some liability on the part of NULIS or, indeed, any other member of the NAB group, in the event that the SFT proceeded without grandfathered commissions?---Yes, I believe there is.  
45

Are you referring to the top of page 24/127?---Yes, I am.

Okay. Let's bring that up. It's the next page over, .2939. You see you're referring to the first paragraph at the top of the page. Is that right?---Yes.

And it says:

5

*If the trustee was to contemplate terminating commission payments, separate legal advice would need to be obtained to determine whether commission payments could be terminated without exposing MLC Nominees or NULIS or any other entity of the NAB group to liability for breach of contract.*

10

?---Yes.

That's the sentence that you rely upon?---That is what I was referring to, yes.

15

And that suggests, doesn't it, that you don't know or you didn't know at the time that you sponsored this paper, whether there would be a liability of MLC Nominees or any other member of the NAB Group in the event that grandfathered commissions ceased?---I think it was very clear that if these commission arrangements were terminated, that would in itself constitute a breach of contract.

20

That's the opposite of what is said in that sentence that you've pointed to?---It was my understanding – it is my understanding still – that the issue at play was if – that if the trustee did not honour the commission arrangements, then that would constitute breach of contract.

25

That's not what the paper says, is it? It doesn't say that's the issue at play?---Okay.

Do you agree with that?---I can see the distinction between the previous trustee and the – and the NULIS trustee.

30

It's not just that, is it? There's multiple different issues with your statement that it was clear that there was a breach of contract. The first issue is, as you've agreed, there's a difference between NULIS, the new trustee, and the old trustee. You agree with that?---Yes.

35

NULIS is not a party to the contracts with the advisers at this time?---At this time, that's correct.

40

The second issue is you're saying you understood that it was clear that there would be a breach of contract if grandfathering commissions were terminated. In fact, the paper says:

45

*If the trustee was to contemplate terminating commissions, separate legal advice would need to be obtained to determine whether anybody is actually going to be liable for breach of contract.*

Do you agree with that?---Yes.

All right. So breach of contract cannot have been the reason for making this decision. Do you agree?---For the NULIS trustee, I accept that. Thank you.

5 And then if we go back a page, do you see about halfway down the page it says Alternative Options:

*In considering whether it would be appropriate for NULIS to continue to pay grandfathered commissions following the SFT, management also considered the following alternative options.*

10 ?---Yes.

And the second option that was considered was to:

15 *Cease the payment of grandfathered commissions.*

?---Yes.

20 Immediately following the SFT?---Yes.

And it said about that:

25 *That without mitigating actions, a significant impact to member attrition is considered possible due to consequent financial adviser dissatisfaction, and this would lead to the following member consequences.*

And the first is:

30 *Due to high levels of member attrition, a significant reduction in funds under management would arise.*

I just want to start with that proposition. Can you explain to the Commissioner the logic of this proposition?---The logic was that if commissions were ceased to financial advisers, then they would likely take those clients to different providers.  
35 There would be dissatisfaction with the group, notwithstanding- they would perceive that someone is breaching a contract – I take the point that it may not be NULIS – but they would then move – likely move their customers to a different fund, or that is a possibility, or that was what was contemplated, and that that would then have subsequent impacts on the sustainability of the fund by virtue of the fact that the  
40 assets had fallen.

And, again, so that we can understand this, you know that financial advisers are obliged to act in the best interest of their members?---Yes.

45 How is it, in your view, that they're going to decide to move their members to some other product – superannuation product, given that obligation to act in the best interests of members?---I think it would have been a common understanding that if

the commission arrangements were cancelled, then those financial advisers would be dissatisfied with MLC as a business, and likely could take – and likely take the business elsewhere.

5 If we come back to my question, how does that proposition fit with the obligation of financial advisers to act in the best interests of their clients?---I think – I think the – I think those two can be reconciled, and in the sense that a financial adviser does have that obligation, and it could be met with MLC products or other providers.

10 I see. There might be two products equally suited for the client, one of which is the NULIS product and one of which is the product of some other provider, and in that case the financial adviser, because they are annoyed with NULIS, might choose to move to a different provider. Is that right?---That could happen.

15 All right. And that was the risk that was of concern here?---Yes.

And can I – can I offer some other possible alternatives, and you help the Commissioner to think about these. Was it a view of management, of which you are one and the sponsor of this paper, that for so long as the financial advisers were receiving commission, they would not look to move their clients to another superannuation provider?---That is a fair statement.

And that is, even if it was in the best interests of that member to move to another product, the financial adviser would keep the member in the NULIS product because they were receiving commission?---As you – as you point out, the best interest duty sits with the financial adviser. And so that – that obligation is best answered by that financial adviser.

No, no, you – I'm afraid you can't avoid the question in that way, Mr Carter, because, you see, this is a paper being presented by management and by you to the board to make a decision on the basis of a prediction as to how the financial advisers are going to act. And my question is about the view that you, as part of the management team that sponsored this paper, took as to how financial advisers would behave. So if we come back to my question: is it the case the view you took was that for so long as the financial advisers were continuing to receive commission from the NULIS product, they would not, or it would be unlikely, to act in the best interests of their members by moving those customers to a different superannuation product?---I would frame it if they would be less likely to move their – their customers to a different product. I'm not – I'm not convinced on the best interests argument.

Why not?---Because I am not in a position to – to comment on the best interests of advisers and their relationship with the customer.

45 Was there any assessment done of the number of members that were likely to be moved as a consequence of commissions being turned off?---I believe there was. I can't recall but I believe there was.

Was there an assessment done as to what the financial effects would be for the NAB Group if commissions were turned off?---I can't recall.

5 Because certainly a proportion of the financial advisers who were receiving this commission were financial advisers that were either corporate authorised representatives or authorised representatives of AFSL holders that formed part of the NAB group. Is that right?---They would have been a portion of these advisers.

10 So there would have been a financial detriment to the NAB Group as a consequence of these commissions being turned off?---Yes.

15 And if it's the case that freed of the inducement of commissions, the advisers would move the customers to a different product consistent with the adviser's best interest duty, then that would also be to the financial detriment of the NAB Group?---Yes.

Because those members would no longer be part of the trustee – I'm sorry, part of the super fund and, therefore, the various fees that are earned on those members and that ultimately are passed back to the NAB Group would no longer be earned?---Yes.

20 I tender that document, Commissioner.

25 THE COMMISSIONER: Yes. Board paper 10 June '16, MLC Nominees, NULIS and PFS Nominees, NAB.005.562 – what's the last four digits that are the best reference, Mr Hodge? We've had about five goes at it?

MR HODGE: I will say .2934\_E.

THE COMMISSIONER: Thank you. Exhibit 5.7.

30

**EXHIBIT #5.7 MLC NOMINEES, NULIS AND PFS NOMINEES DATED 10/06/2016 (NAB.005.562.2934\_E)**

35 MR HODGE: Thank you. Now, this paper went through a number of drafts?---I believe that would be true.

40 All right. And I just – I am going to bring up another document. Can we bring up NAB.076.027.5939. I don't know that you've got this document. It's probably being brought over to you. I'm sorry, I think I've actually given you the wrong doc ID. Can we go to NAB.076.027.5933.

THE COMMISSIONER: Should Mr Carter hand back the hard copy he's been handed, I think?

45

MR HODGE: Yes, thank you, Commissioner.

THE COMMISSIONER: Yes. Can we have the hard copy back.

MR HODGE: So this is a chain of emails – you can see you’re included on the chain of emails, Mr Carter?---Yes.

5

And if we go over the page to the page ending .5934, you will see this is an email from Brian Marriott?---Yes.

10 Who is Brian Marriott?---Brian Marriott was part of what we called the office of the trustee, the trustee representative, a first line control to make sure the trustee interests were followed.

15 Right. So he’s – this is an email in which he is providing comments on the draft version of the final paper we’ve now looked at. Have you looked at this email before you’ve come to give evidence today?---I don’t believe so.

Okay. I will just point out a couple of things to you, and see if this helps you at all. Do you see that Mr Marriott says, about halfway down the page:

20 *The commercial arguments made in the paper should be a secondary consideration to the member interest considerations. The fiduciary considerations are what is most relevant and I would like to see some of the commercial aspects tempered. I understand the significance of the commercial impacts – and I do think the paper brings some bias to the commercial risks (which are real) given the strength of concerns in that space (and to be clear, I am not suggesting ignoring that or being silent).*

25 What were the commercial concerns that are being referred to here?---I can’t be exactly sure what Brian is referring to in this email.

30

Do you remember, bearing in mind you were the EGM of the superannuation and platforms, and you were the sponsor of the paper, what the commercial concerns were that existed within NAB about not grandfathering commissions?---I think they would be consistent with the – the discussion we were having previously.

35

A loss of revenue to the NAB Group?---Yes.

All right. I tender that document, Commissioner.

40 THE COMMISSIONER: Exhibit 5.8, NAB.076.027.5932, emails of May ’16, Carter and others, NULIS Grandfathering Arrangements Paper.

45 **EXHIBIT #5.8 EMAILS OF MAY ’16, CARTER AND OTHERS, NULIS GRANDFATHERING ARRANGEMENTS PAPER (NAB.076.027.5932)**

MR HODGE: And then can we bring up NAB.076.047.7201. If we go to the next page. If we go to the page ending .7204. Now, this is a chain of emails, Mr Carter. You don't seem to be on it, although Ms Vincent, who reports to you, is on it, Mr Garde, who's in a different section, is on it. If we go to page .7205. And you see at the bottom of the page there's an email from Mr Marriott dated 23 April 2016. It's sent to a number of people. Again, you're not on it. I assume you don't recall having seen this email?---No, I do not.

All right. I just want to ask you about a proposition for – that Mr Marriott puts forward over the following page, which is .7206. And it's a bit difficult to see but about a quarter of the way down the page, you will see Mr Marriott expresses the view:

*I don't think any of that material in the appendices have any relevance to the issue. It's just noise that will make people cranky and look like we are trying to create a diversion. We've long been told that very few of those members in these old products actually are being actively advised and there is plenty of evidence to support that. It's pretty clear that many would not be where they are if they were being actively advised, for example Five Star. In fact the whole Ex-Aviva Five Star strategy at one point was about getting some funding from the trustee to pilot engagement with members and reengage them in the advice process. It seems a cute argument to make that we should grandfather because these people are getting something in return for the commissions being paid when all the paper trail will tell a different story.*

Now, this is a different paper that Mr Marriott is considering. I want to understand whether this reflects your views or your recollection of your views. The first is do you recall that it was clear that members who were in older products were, for the most part, not getting advice?---No, I don't recall that.

Do you recall the specific idea that members who were in Five Star products were not getting advice?---No, I don't recall.

And similarly Ex-Aviva products?---No.

Right. So your view is they were getting advice?---I have no reason to believe they weren't.

All right. And is the risk that - - -

THE COMMISSIONER: Well, is it, therefore, a matter to which you simply did not turn your mind?---In the context of this, I – that would be – I'm not in a position to say, Commissioner.

Well, the question is not intended to be critical of you. I just want to understand your position. Is it the position that you did not turn your mind to whether these people were or were not getting advice?---The challenge I've got is I was not on this email,

and so I don't know whether – I don't know the context in which I would have turned my mind to that question.

5 MR HODGE: Mr Carter, I want to move to another topic now, or to return to a topic we've been looking at.

THE COMMISSIONER: This email is - - -

10 MR HODGE: Sorry, I tender that, Commissioner.

THE COMMISSIONER: Emails April '16 Marriott and others FOFA paper NAB.076.047.7201 exhibit 5.9.

15 **EXHIBIT #5.9 EMAILS APRIL '16 MARRIOTT AND OTHERS FOFA PAPER (NAB.076.047.7201)**

20 MR HODGE: Thank you, Commissioner.

I want to return to the issue of PSFs, Mr Marriott – I'm sorry, Mr Carter, and just try to understand some aspects of that. Can we bring up ASIC.0038.0003.8292. So this is – you will see a publication from MLC concerning the MasterKey Business Super?---Yes.

25 And if we go to the second page, you will see it's the Employer Guide, and the preparation date is 19 November 2012?---Yes.

30 And it's issued by MLC Nominees?---Yes.

And then if we go over the page to .8305. This is part of the guide directed towards members – I'm sorry, directed towards employers. And you see there's a middle column which is:

35 *Fees you negotiate with your plan adviser.*

?---Yes.

40 And it says:

*There are a number of ways you can remunerate your plan adviser for the services they provide you and your employees.*

45 Do you see that?---Yes.

And then it says:

*These fees are paid by your employees.*

?---Yes.

5 And the first one is:

*Adviser contribution fee.*

?---Yes.

10

It says:

*We deduct up to 5.88 per cent of contributions to pay your plan adviser.*

15

?---Yes.

Continuing:

*This amount is agreed by you with your plan adviser.*

20

?---Yes.

Now – actually, I will come back to that in a moment. Then you see the second one is plan service fee:

25

*This fee is up to 1.5 per cent of your employee's account balance. It may be a dollar amount, as long as it doesn't exceed this limit.*

?---Yes.

30

And the guide appears to be representing that both the adviser contribution fee and plan service fee are parts of the ways in which the employer can remunerate the employer's plan adviser for services that the plan adviser provides to the employer and the employer's employees. Do you agree with that?---Yes.

35

Now, I just want to understand that in light of an answer you gave this morning, where you said "adviser contribution fee is commission"?---Yes.

40

Now, if it was commission, it wouldn't be a payment for services. Do you agree?---Yes.

And do you agree that what is being said here by MLC Nominees to employers is that the adviser contribution fee will be part of the remuneration that is paid to the adviser for services?---I think what it – I think what it says is:

45

*We deduct that amount paid to your plan adviser. The amount is agreed with you and your plan adviser.*

I don't see a reference to services.

No, no. Look above that:

5           *There are a number of ways you can remunerate your plan adviser for the services they provide you and your employees. These fees are paid by your employees.*

?---Yes.

10

It lists out the three. The first two are described as fees and the third one is a commission?---Yes.

15 I'm just trying to understand the answer you gave earlier to the effect that adviser contribution fee is a commission rather than a fee for service?---That is my understanding.

But why?---Does it – sorry, a fee for – it's a commission, yes. It doesn't mean that – it doesn't mean that services weren't being provided.

20

No, I understand. But this is – it appears to be saying to the employers, “You can agree with the plan adviser that they will be remunerated in various ways for the services they provide you and your employees”?---Yes.

25 So that would suggest that an adviser contribution fee is not a commission; it is a fee for the services that the plan adviser provides to the employer and the employees?---What – what I'm saying is I understand pre-FOFA is that this was a form of commission.

30 No, no. You see, as you know, this is the publication put out by MLC in November of 2012?---Yes.

And you've explained to us earlier, MLC moved earlier than FOFA required in order to switch commissions to fees for service?---Yes.

35

And this is the guide that has been published to employers about that?---Yes.

40 And what I'm trying to understand is why do you say that adviser contribution fee is a commission in light of what's said by MLC to the employers?---Only my – my rationale is that it doesn't mean – just because a commission is being paid, it doesn't mean that services aren't being provided. That is my – that is my understanding.

45 No, that's right. But there's an important difference, isn't there, between a commission and a fee for service, which is if it's a commission and you don't provide services, then MLC can say and does say, “We don't have to refund the money if we don't provide the service”?---Yes.

But if it's a fee for a service, and MLC hasn't provided the service or the adviser hasn't provided the service, then MLC has to refund the money?---If that were true, that would be the case.

5 All right. So when we look at what was said in November of 2012 to employers, employers were told that the adviser contribution fee and the plan service fee, in fact, somewhat oddly, the insurance commission, was to be paid to the plan adviser for the services that are provided by the plan adviser to the employer and the employees. Do you agree?---Yes.

10 And I just want to make sure I've correctly understood the view that you hold, which is notwithstanding what's said here, that, in fact, it wasn't remuneration for service, it was just a commission, that is, adviser contribution fee was not remuneration for service, it was just a commission?---That is my understanding.

15 All right. And can you explain what the basis of your understanding is?---That the – I understand that the adviser contribution fee was a commission. It does not mean that services weren't provided, but the nature of the arrangement was a commission arrangement.

20 Yes. What is the basis for your understanding that the nature of the arrangement was a commission arrangement?---My recollection of what the adviser contribution fee was, it was by its characterisation a commission.

25 Who characterised it in that way?---I don't know.

And when?---I don't know.

30 All right. Do you agree with me that your understanding appears to be inconsistent with what is set down in this employer guide?---No.

Okay. And why not?---Because on my read of this document, advisers can still provide services notwithstanding that it is being paid through a commission.

35 Now, I think you know that's not an answer to my question, because we've now acknowledged a number of times that the difference between commission and a fee for service is that with commission the – there is no obligation to provide a service, but with fee for service there is. That's – we've agreed on that difference, haven't we?---Yes.

40 And what I'm trying to understand is why it is that you think that this statement that:

*There are a number of ways you can remunerate your plan adviser for the services they provide you and your employees –*

45 and then a list of adviser contribution fee and plan service fee and, oddly, insurance commission, is consistent with your view that the adviser contribution fee is not

remuneration for services, it is commission?---And sorry, Mr Hodge, what is your question?

5 Yes. What I want you to explain is why do you say, notwithstanding what's set out here, that the adviser contribution fee is not remuneration paid to the adviser for services?---At risk of repeating myself, it is because that particular fee was, as I understand, a commission.

10 Is there something that distinguishes then, in your mind, the adviser contribution fee from the plan service fee?---Yes.

And what is that?---That the intent of the plan service fee was – its character was an advice fee, as opposed to a commission.

15 Whose intent?---The intent of management at the time.

Of MLC?---Yes.

20 I think – I hope we're getting somewhere. Your point is management intended that the adviser contribution fee would be a commission, but didn't intend that the plan service fee would be a commission?---Yes.

25 And, therefore, that intention of management determines whether it's a commission or a service fee?---No, I don't think it's the intention of management that determines its character.

30 I see. How does the Commissioner now, or anybody, looking back and engaged in some sort of fact-finding exercise, determine whether something is a commission or a fee for service?---It should be – it should be disclosed to – to – it should be disclosed.

All right. I tender that document, Commissioner.

35 THE COMMISSIONER: MLC MasterKey Business Employer Guide, November 2012, ASIC.0038.0003.8292, exhibit 5.10.

40 **EXHIBIT #5.10 MLC MASTERKEY BUSINESS EMPLOYER GUIDE,  
NOVEMBER 2012 (ASIC.0038.0003.8292)**

MR HODGE: All right. So the way in which it would be disclosed, if you were staying in the plan, is by a significant event notice?---If there was a change, yes.

45 Yes. Well, if you were, for example, going from commission to fees for service, then you would have to issue an SEN?---Correct.

All right. Can we go to ASIC.0036.0001.2760. So this is the reference guide that explains the changes that were being made for members of TUSS from 8 September 2012?---Yes.

5 And you can see it was prepared on 1 June 2012?---I can't see that.

I'm sorry. If you look down in the left-hand corner, you will see - - -?---Yes.

- - - preparation date?---Yes.

10

And if we go to page 4. This is explaining the new simplified fee structure that MLC was moving members of the MasterKey Business Super product to?---Yes.

It says:

15

*We're changing the fees for MLC MasterKey Business Super to make them simpler and more transparent.*

?---Yes.

20

And then if we look down at the second half of the page, we see:

*Fees when money moves into or out of the fund.*

25

?---Yes.

We see contribution fee?---Yes.

Continuing:

30

*Up to 5.88 per cent of each contribution.*

?---Yes.

35

Continuing:

*A lower contribution fee can be negotiated by your employer with your plan adviser. The contribution fee is calculated as a percentage of your investment and deducted from your account by selling units at the time the contribution is invested.*

40

?---Yes.

Continuing:

45

*A different contribution fee percentage can be applied to personal and employer contributions.*

?---Yes.

Right. And it then says – so that was the fee up until 8 September 2012. And it says:

5        *New. This fee is now called the adviser contribution fee. Refer to advice fees on page 10.*

Do you see that?---Yes.

10      And then if we go to page 10, it says:

15                    *A new simplified and transparent fee structure. The value of advice. You may pay a plan service fee to your plan adviser. This fee applies if your employer has arranged for the adviser to provide financial advice services that are tailored to the needs of the employees in your company.*

?---Yes.

20      And then you see there's a table starting from the – halfway down the page which says "Current and new"?---Yes.

And then there's a line which says:

25                    *Advice fees – fees your employer negotiates with your plan adviser.*

?---Yes.

And adviser contribution fee:

30                    *This fee is currently called the contribution fee.*

?---Yes.

35      And we've looked at that already. And then the new one is:

*Up to 5.88 per cent of each contribution. The contribution fee can be agreed by your employer with your plan adviser.*

?---Yes.

40

Continuing:

*The adviser contribution fee is deducted from your account at the time the contribution is invested*

45

?---Yes.

Continuing:

*A different adviser contribution fee percentage can be applied to member and employer contributions.*

5

?---Yes.

And just so that I understand, the – your understanding is that the adviser contribution fee is not actually a fee for advice?---That is my understanding.

10

Even though the SEN describes it as advice fees?---That is my understanding.

All right. Instead, it's a commission. Is that right?---That is my understanding.

15

Right. And, again, just so I understand, is the characterisation of it as a commission consistent, in your view, with what's set out in this guide?---Yes.

20

Okay. And could you just, bearing in mind the things we've already talked about, explain why that is?---I believe this is – this was a fee pre-FOFA that had been disclosed – sorry, a commission fee that had been disclosed. And – but its character, again, what it was was – was a commission.

All right. And then you see the next advice fee is – that was the current advice was asset-based commission?---Yes.

25

And another one of the current advice fees was employer service fee?---Yes.

And so the asset-based commission could have been up to .33 per cent?---Yes.

30

And the employer service fee could have been up to 1.1 per cent?---Yes.

And bearing in mind the many nuances of the commission versus fee for service distinction, are we agreed that the employer service fee was at all times a fee for service?---The employer service fee was a commission.

35

So when it says:

*A fee of up to 1.1 per cent of your account balance may be agreed for group-based advice.*

40

It's actually a commission?---Yes.

It's not a fee for the service of group-based advice?---It was – it was a fee that was paid, but it was – but it was a commission.

45

And it was a commission because if it was not a commission then the adviser would be obliged to provide services in exchange for the fee?---That is – that is true.

But is there – is there any more complexity to it than that, that MLC calls it a commission because otherwise if services weren't provided, the money would have to be refunded?---The nature of a commission is that ultimately it is paid by the product provider to the adviser.

5

Well – yes, it's provided by the product provider after the product provider has deducted the relevant amount from the customer?---That is right. That is the nature of what – that is one of the features of the commission arrangement.

10 Yes. It is ultimately paid for by the customer. Do you agree?---Ultimately, yes, that is true.

Okay. But your point is the legal arrangement is that the product issuer is agreeing to pay the money to the adviser?---Correct.

15

Is that right? And the customer is agreeing to allow the product issuer to deduct commission?---Yes.

20 And this question of whether the employer service fee is a commission or a fee for service, is that something that you looked into during the time when you were the EGM?---No. All of these – the time at which this change was made was prior to my – to my role, and when I moved into the superannuation business. So the changes here were made moving these asset-based commissions and the employer service fee, changing those arrangements to, as described here, the plan service fee. And this  
25 happened before my arrival.

I understand. Just stepping back for a moment. During the period when you were the EGM for superannuation and platforms, do you recall anybody raising an issue as to whether the employer service fee was a commission or a fee for service?---No.

30

Okay. You don't remember ever having turned your attention to consider that?---No.

Okay. And so your understanding was that asset-based commission and the employer service fee were both commissions?---Yes.

35

And they were .33 per cent for the asset-based commission and 1.1 per cent for the employer service fee?---Yes.

40 So cumulatively they were 1.43 per cent, or up to 1.43 per cent?---Yes.

And then they were replaced with the plan service fee which was a fee of up to 1.5 per cent of your account balance?---Yes.

45 And we agreed, I think, the plan service fee is a fee for service?---The plan service fee was a fee for access to general advice and support services.

I just – I don't understand it. It says:

*The fee is for providing financial services that are tailored to the needs of the employees in your company.*

?---Yes.

5

How can it be a fee for access?---Well, there certainly is other documentation that refers to access.

10 Documentation from 2012?---I am – I do not know the specific answer to your question.

All right. So, again, your understanding of the plan service fee is that it was a fee for access to service?---General advice and support services.

15 All right. Not a fee for providing financial services?---Correct.

Okay. And so in that respect as well, the reference guide issued by MLC that we are looking at is misleading?---I'm not in a position to make – make that statement.

20 Just as a matter of fact, you're saying this – what is stated in this reference guide is, in your view, untrue?---I am saying that I agree that that wording could have been enhanced.

25 All right. And one of the other features of this page is that at the top of the page it describes fees your employer negotiates with your plan adviser for these advice fees – I am sorry, I said at the top of the page. A third of the way down you see it's identifying advice fees, fees your employer negotiates with your plan adviser. Do you see that?---So where are you?

30 I'm sorry, about – I said a third, I think I should have said a half. Do you see halfway down the page it says:

*Current, new, advice fees, fees your employer negotiates with your plan adviser.*

35

?---Yes.

40 Okay. And the adviser contribution fee and the plan service fee are both under the heading of fees your employer negotiates with your plan adviser?---Yes.

And then at the bottom of the page we see:

*Fees you can negotiate with your financial adviser.*

45 ?---Yes.

And under there it lists adviser service fee and it says there's no change for that?---Yes.

5 And to tie this all back to a point you made this morning, you're saying for the plan service fee, even when it forms part of the MasterKey Business Super product, it is actually a fee that can be negotiated by the employee with the adviser?---Yes.

10 And, in fact, even more than that, it is a fee that the employee doesn't even need to negotiate about with the adviser. The employee can just call up MLC and say, "Switch that off"?---Yes, it's negotiated in the first instance by – with the adviser, with the employer, but then the member has the opportunity to then further reduce the fee.

15 Well, they can just call MLC up and say "switch it off"?---That's my understanding.

And that was the same for both the MasterKey Business Super product and the MasterKey Personal Super product?---That's my understanding.

20 But the reference guide, do we agree, doesn't say that?---This reference guide does not.

25 Okay. And then if we go over the page to ASIC.0036.0001.2770, this is then explaining what happens when you leave the employer and get transferred over to the MasterKey Personal Super product?---Yes.

And it says:

*Your administration fee may increase because you will no longer be part of an employer plan.*

30 ?---Yes.

And then it says:

35 *Any adviser contribution fee will cease.*

?---Yes.

40 And can I just check, that was the case, was it, that the adviser contribution fee would cease when an employee was transferred from the business product to the personal product?---Yes.

Okay. And then any plan service fee will be capped at .44 per cent?---Yes.

45 And that plan service fee there, is that a fee for service or a commission?---No, that is – that is an advice fee.

Okay. And – well, sorry, this can be confusing. It's not an adviser service fee?---No, it is - - -

It's not a fee for personal advice?---Correct.

5

Which would be the adviser service fee. It's a fee for – now, you said for advice. Do you mean access to advice?---Yes. This is the plan service fee.

Yes?---The fee for access to general advice.

10

Okay?---And support services.

And is there anything that identifies that that's what it's for?---Not on this page.

15

Okay. Have you seen any contemporaneous document from 2012 that identified what the PSF was for?---It would have been included in other forms of member disclosure, but I don't have that at my fingertips.

20

What would that – just so we can try to look for it – what would that mean, would that mean the product disclosure statement?---Correct.

And I had thought, perhaps incorrectly, that you get the SEN, which we've just been looking at, even though it's termed a reference guide, because you're already in the product, and you get the product disclosure statement if you're joining the product. Is that the case?---Yes.

25

Okay. So if you're already in the product, do you receive some other document or would you expect to receive some other document that would say what the plan service fee is for?---You would expect an SEN.

30

Isn't – is this not the SEN?---I can't recall.

Okay. I tender that document, Commissioner.

35

THE COMMISSIONER: Exhibit 5.11, NAB – no it's an ASIC document, is it, Mr Hodge?

MR HODGE: I'm sorry, yes, Commissioner.

40

THE COMMISSIONER: ASIC.0036.0001.2760, MLC MasterKey Business Super plan reference guide dated 1 June '12, with effect from 8 September '12, exhibit 5.11.

45

**EXHIBIT #5.11 ASIC.0036.0001.2760, MLC MASTERKEY BUSINESS SUPER PLAN REFERENCE GUIDE DATED 01/06/2012 (ASIC.0036.0001.2760)**

MR HODGE: Can we go back to a document that was tendered earlier. It's NAB.005.874.0223.

THE COMMISSIONER: Exhibit 5.55.

5

MR HODGE: Thank you, Commissioner. So this is the MasterKey Personal Super annual statement that we were looking at this morning, Mr Carter?---Yes.

10 And then if we go to page .0226. You see there that one of the fees is adviser contribution fee debited and it's \$91.67?---Yes.

I'm just hoping you can help us with this. Wasn't that the fee that got dialled down to zero when you moved from MKBS to MKPS?---Yes.

15 And so what would be the reason why it would still be being charged?---I can't explain that, and if it was, it would be – if my understanding is right, it would be an error.

20 All right. So if there was an adviser contribution fee coming out of an MKPS account, that would be an error?---I believe that is correct.

25 Can we go then to NAB.005.871.0022. So this, as we understand it, is an internal document of MLCs, which is the question and answers that apply for turning off commissions?---Yes. Thank you.

And you see item number 3 is:

*What action will we take if a member requests us to turn off commissions or stop paying their plan adviser?*

30

?---Yes.

And it says:

35 *When a member directly requests us to turn off commissions, we will perform the following.*

?---Yes.

40 And it lists various things that will be turned off or changed?---Yes.

And one thing is that the plan service fee will be removed?---Yes.

45 And that's consistent with the point you were making this morning, which is that if somebody had called up MLC and asked to remove the plan service fee, it would have been removed?---Yes.

And the issue with the disclosure that was made by MLC and NULIS was that members weren't necessarily told that they could do that?---Can you repeat the question, sorry?

5 Yes. And I will leave out the adverb. The issue or the problem that MLC and NULIS have now identified is that it wasn't disclosed to members that they could call up and turn off the plan service fee?---That disclosure was not clear enough, correct.

10 Yes. It said, "You will" – well, we looked at what it said. One of the things it said is this is a fee negotiated by your employer with your adviser?---So, yes, that – I agree that we conclude that that disclosure was inadequate.

All right. And then you see the second bullet point, which is:

15 *Remove adviser contribution fee(s).*

?---Yes.

20 So I just want to understand that. Is this consistent with your understanding that if a member was to call up MLC and ask to switch off the adviser contribution fee, they could do so?---I don't recall. But this is what – that is clearly what the document suggests.

25 All right. And then they can also remove the adviser service fee?---Yes.

And their insurance will get converted over to MySuper?---Yes.

30 And that means that if it's MySuper insurance, there's no commission that's going to be paid out of the MySuper insurance?---Correct.

And then the adviser will be changed to MLC Direct?---Yes.

35 And that's only for MKPS members?---That's what this suggests, yes.

And then there's two other things, that is:

*To confirm the change to members and inform the adviser.*

40 ?---Yes.

And then you see question number 4:

*What if the request is to remove or change the plan adviser?*

45 ?---Yes.

And the explanation is in step 1 for what happens with an MKPS member, and it says:

5                    *MKBS members cannot remove or change their plan's adviser.*  
?---Yes.

But step 2 says:

10                  *For any member (either MKBS or MKPS) remove all fees/commissions as per question 3 above.*  
?---Yes.

15                  And so that would suggest that even if the member was to just call up and ask to remove their plan adviser, and they were an MKBS member, they could remove first their plan service fee?---Yes.

20                  And that's the point you made this morning?---Yes.

And they could also remove their adviser contribution fee according to this?---Yes.

And they could remove their adviser service fee?---Yes.

25                  And they could convert their insurance to MySuper?---Yes.

And is it the case that you were unaware of the possibility of removing the adviser contribution fee until now?---Yes.

30                  Okay. And we can see point 4 under number 4 is:

*If an MKBS plan's adviser is changed to MLC Direct, remove any adviser contribution fees.*

35                  ?---Yes.

Okay. Now, one of the things I am just trying to make sure I've understood is – you see there's an asterisk below that which is:

40                  *According to FOFA requirements, pre-existing commission arrangements must be terminated when an MKPS member changes advisers.*

?---Yes.

45                  And that asterisk just seems to be to the word "MKPS", which is point 1?---Yes.

5 The reason I draw your attention to that is I just want to make sure we haven't misunderstood anything in relation to this document. If the adviser contribution fee was, as you believe it to be, a commission rather than a fee for service, would that have any effect – have any effect on whether or not the member could just call up and turn it off?---Yes.

And why is that?---Because my understanding is with commission arrangements, the member would not have the ability to turn – turn them off or reduce them.

10 And, again, you may just not be able to help us with this, but why is that?---Because I think that's one of the features of them moving to a more – a fee model, that then the – the end customer has more control. They pay the fee directly and are able to reduce the fee, they're in control.

15 I understand that's the pitch, which is the benefit of fees is that it's then something that the member has control over, and also that they actually get a service for it, and probably many other things, but I'm just trying to understand why it is that you believe that a member can't turn off deductions from their superannuation used to pay commission?---I – I don't know the answer to your question.

20 Okay. I tender that document, Commissioner.

25 THE COMMISSIONER: Internal Q&A re removing an adviser and turning off commission, May 2015, NAB.005.871.0022, exhibit 5.12.

**EXHIBIT #5.12 INTERNAL Q&A RE REMOVING AN ADVISER AND TURNING OFF COMMISSION, MAY 2015 (NAB.005.871.0022)**

30 MR HODGE: Can we then go to ASIC.0039.0003.0318. It may be that you don't – you've never looked at this and don't know the answer to this, Mr Carter, but this is an internal legal memorandum of NAB that was produced to ASIC, and has been produced to us, and that attempts to explain how it is that NAB has approached the issue of contribution fees, plan service fees and adviser service fees. I just want to know whether – is this something that you can recall having seen at any time?---No.

Okay. Commissioner, I will deal with that through another witness.

40 THE COMMISSIONER: Yes.

MR HODGE: Can we bring up NAB.155.018.8565. This is an email from Kara Welsh to Simon Martin and copied to Brian Marriott. I think you've already explained, Brian Marriott, was he the COO of the office of the trustee?---Yes.

45 Okay. And Kara Welsh was described as a trustee advice partner from the office of the trustee?---I believe that's correct.

Did you ever deal with Ms Welsh?---It would have been limited.

Okay. And who is Simon Martin?---I can't recall Simon's role.

5 Okay. Was he somebody you dealt with?---I – the name – the name rings a bell but I – I can't recall Simon's role.

All right. If we go over to the second page. You see about halfway down the page there's a heading which is Contribution Fee Event?---Yes.

10

And what's said is:

*This is hot off the press. I was speaking to Pia Baldacchino.*

15 Who is Ms Baldacchino?---I don't recall.

Okay:

*From the Guardian events team.*

20

What is the Guardian events team?---At some stage we centralised a specialist team to work through complex event remediation and that's what Guardian was doing.

All right:

25

*Who indicated that there is a contribution fees event (about to be raised I think). Same impacted members as event 471986.*

30 Which if you go back to the first page you will see this is the members affected by the failure to put in place instructions to cease deducting the adviser service fee?---Yes.

So we go back over. It says:

35 *I understand a business decision has been made to refund these fees. I don't know why that is the case yet.*

?---Yes.

40 I just want to, having given you the opportunity to look at this, ask you, do you now have any recollection of any issue being raised about the refunding of contribution fees?---No, I do not.

All right. I tender that document, Commissioner.

45

THE COMMISSIONER: Emails October '15 between Welsh, Marriott and others, contribution – what's the subject line of the email, sorry, Mr Hodge?

MR HODGE: It's Advice Fee Events.

THE COMMISSIONER: So emails October '15 between Welsh, Marriott and others, advice fee events NAB.155.018.8565 exhibit 5.13.

5

**EXHIBIT #5.13 EMAILS OCTOBER '15 BETWEEN WELSH, MARRIOTT AND OTHERS, ADVICE FEE EVENTS (NAB.155.018.8565)**

10 MR HODGE: Now, once you were – sorry, I withdraw that. I will put it another way. From about May of 2016 at least, you were involved in discussions about how the PSF fees would be remediated?---Yes.

15 All right. And I want to show you an email and the attachment. If we go to NAB.076.047.5596. So this is an email invitation to a meeting being organised by Meredith Buchanan. What was Ms Buchanan's role?---I believe Meredith was in the product team.

20 Did she report to you?---Ultimately she would have.

Okay. And she says:

25 *Paul has asked me to organise this meeting to discuss information that has been gathered on the plan service fee in relation to the SWiFT and Encompass projects.*

?---Yes.

30 And you see there is an attachment which is SWiFT investigation discussion points?---Yes.

I tender that document, Commissioner. Actually, I might bring up its attachment and then we can tender them together. Can we bring up NAB.076.047.5597. We understand this is the attachment to this document. Have you seen this document before?---No. I don't believe so.

35 The email was sent to you?---It may – I - - -

40 You don't recall having seen it?---I can't recall. I can't recall.

All right. Now, if we go over to page .5599?---Yes.

You will see at the top of the page the word Outcome and then it says:

45 *As the ABC and ESF –*

ABC is asset-based commission and ESF is employer service fee. Is that right?---Yes.

Continuing:

5

*...were exactly matched to the sum of the PSF, the charging of the fee to non-advised members did not impact these members' overall better-off/worse-off position.*

10 ?---Yes.

I just want to ask you about that statement. You will remember when we looked at the numbers that it was 1.1 per cent for the ESF and .33 per cent for the asset-based commission which would be in total up to 1.43 per cent. And the plan service fee was 1.5 per cent?---Up to 1.5 per cent, yes.

15 Was there, do you recall, a tax issue which was that there would now no longer be a credit that was being gained by one of the MLC companies for paying the commission to advisers and, therefore, the fee that was to be paid by the member needed to increase to reflect the loss of that credit?---I don't recall any issue along those lines.

You just don't – that doesn't ring any bells with you?---No.

25 Okay. And then it says:

*As a result, it is open to us to position a retrospective approval with the trustee on this basis.*

30 ?---That's what that says.

Do you recall being involved in any discussion about seeking retrospective approval of the trustee?---No.

35 Okay. Do you understand what that refers to at all?---No, I – I don't – I don't recall the context in which that statement was made.

All right. And then if we go over the page to .5600. You will see, about two-thirds of the way down the page, there's a statement:

40

*A reasonable argument can be mounted to suggest that the member was provided with adequate information to enable them to question the fee and negotiate a lower rate if an adviser was not providing them with advice.*

45 ?---Yes.

Do you remember being involved in any discussion about the formulation of that argument?---I cannot recall.

5 Do you remember it being a matter of debate within NAB as to whether or not the member had actually been provided with adequate information or not?---I don't recall that debate.

10 All right. And then you see that there's then a heading which is Rationale for why the money was retained for the use of direct member servicing capability?---Yes.

There is a heading on one column which is Facts:

*The money withheld from non-advised members paying the plan service fee was positioned to the trustee as being used to assist members who were not advised.*

15 ?---Yes.

20 And then the source that it gives is something that's extracted from a management paper dated 19 April 2012?---Yes.

And this seems to be a reference to the statement:

*Where no adviser is attached MLC will provide additional support to these members.*

25 ?---Yes.

30 And that's a statement in relation to additional support for members or the higher negatively impacted members as a result of the fee changes?---Can you – can you re-state the question?

Yes. The – actually, let me ask you a different question. Have you ever gone back to look at the 19 April 2012 management paper?---I don't recall.

35 Okay. Let's keep going then over the page to .5601. So you see the fact on the left-hand side is:

*At the time of the SWiFT changes, the prevailing way members were serviced was via the financial adviser. However, where one was not made available, MLC provided additional services to members. This capability has developed over time to increasingly be provided by the fund.*

40 ?---Yes.

45 And then there's a list of financial services delivered to MKBS/PS members under the digital direct servicing model?---Yes.

Then you see at the bottom of the page it says:

5 *While it can be argued that all members have access to these services,  
regardless of whether they have an adviser, these services are required more  
readily by members who do not have access to a plan adviser.*

?---Yes.

And then it says Outcome:

10

*The point we are making here is that while the advice model was going through  
an evolution, the need to continue to collect PSF revenue was required at least  
in part to service members without an adviser.*

15 ?---Yes.

20 Do you recall having been involved in discussions about whether it was possible to  
identify services that could be said to have been provided to members unlinked from  
a financial adviser but paying the PSF?---I remember that is one of the things that we  
investigated as part of the – as part of the remediation.

Whether it was possible to make that assertion?---Yes.

25 All right. I tender that document, Commissioner. That's the email plus its  
attachment.

30 THE COMMISSIONER: Invitation of 3 May '16 from Buchanan  
NAB.076.047.5596 and its attachment investigation into Project SWiFT  
NAB.076.047.5597, together exhibit 5.14.

30

**EXHIBIT #5.14 INVITATION OF 3 MAY '16 FROM BUCHANAN AND ITS  
ATTACHMENT INVESTIGATION INTO PROJECT SWIFT  
(NAB.076.047.5596 & NAB.076.047.5597)**

35

40 MR HODGE: Then can we bring up NAB.162.011.1076. NAB.162.011.1076. So  
this is a chain of emails between – is it – is that pronounced  
Bourguignon?---Bourguignon.

40

Bourguignon. And who is she?---Lara worked for me at the time.

Okay. So she is a report to you?---Yes.

45 And reported directly to you?---Yes.

And you will see you've sent an email to her on 19 June 2016 which says:

*Having spoken to Nicole S.*

?---Yes.

5 Nicole S, is that Nicole Smith?---That – that would be Nicole Smith.

And at the time Ms Smith was the chair of the boards of each of the trustees?---Yes.

10 And you see at the bottom of the page it says “On PSF”?---Yes

The first dash is:

*Root cause on this one arguably a bit more illusive –*

15 Should that be elusive? That’s right –

*Nicole agrees largely comes down to entitlement to fee and associated stuff-up by legal team not to catch. Enhanced control environment is that this type of change would now demand external legal assurance.*

20

?---Yes.

25 Can you just explain what that means about external legal assurance?---I believe what I would have been referring to, as we were looking into this event, it became clear at the time of the introduction of this fee there were multiple control areas that should have been in place that weren’t. And I would have been referring to the fact that today we would have been requiring some form of external legal assurance on a material fee change.

30 And you see it says in the third dash point:

*Am I right in saying we have turned these PSF off for all products now (or just TERP)?*

35 ?---Yes.

Do you recall whether you ended up confirming that?---I can’t recall.

40 All right. And then you see it says:

*Can we include something on how these fees are monitored in BAU.*

What’s BAU?---Business as usual.

45 And so what does that mean? How these fees are monitored in business as usual?---Just in the normal course of business.

And then it refers to:

*The ability of members to turn off.*

5 ?---Yes.

And if we go over the page to .1707, this seems to follow on from an earlier email that you've sent?---Yes.

10 And you're suggesting a two-pager. I'm just trying to understand what that is. Is that a two-pager for the board or a two-pager for ASIC?---I don't recall.

You're not sure. All right. I tender that document, Commissioner.

15 THE COMMISSIONER: Emails from and to Carter and others 19 June '16, NAB.162.011.1076, exhibit 5.15.

20 **EXHIBIT #5.15 EMAILS FROM AND TO CARTER AND OTHERS DATED 19/06/2016 (NAB.162.011.1076)**

MR HODGE: And then can we bring up ASIC.0036.0001.2898.

25 THE COMMISSIONER: I hope we've got something more than that, Mr Hodge.

MR HODGE: Can we just see what is on the next page, Commissioner. We will get that taken care of overnight, Commissioner. We can take down that document. Do you recall, Mr Carter, that in July of 2016 NAB and the trustee wrote to ASIC about the PSFs?---I don't recall the specifics.

All right. Can we bring up ASIC.0036.0002.0927. So this is a letter dated 23 August 2016. It's being sent by ASIC back to Ms Smith and Mr Hagger?---Yes.

35 And if you look down in paragraph 2, subparagraph (a), subparagraph (i), you will see a letter or a reference to a without prejudice letter to ASIC dated 22 July 2016?---Yes.

And you will see there's a reference to remediation programs?---Yes.

40

Do you recall whether you were involved in determining what remediation program would be undertaken by NULIS or the National Australia Bank in relation to the PSFs?---Yes.

45 Okay. And did you have primary carriage of that, or were you reporting to somebody else about that?---I – my – my direct reporting boss was Andrew Hagger,

but as the responsible executive for superannuation, I would say I had primary carriage.

5 All right. So this letter – is this one that you have seen before?---No. I do not believe I have seen this letter.

All right. I will tender that document, Commissioner, but I will come back to it with Ms Smith.

10 THE COMMISSIONER: Letter dated 23 August '16, ASIC to Smith and Hagger, ASIC.0036.0002.0927, exhibit 5.16.

15 **EXHIBIT #5.16 LETTER ASIC TO SMITH AND HAGGER DATED 23/08/2016 (ASIC.0036.0002.0927)**

20 MR HODGE: Now, can we then go to NAB.076.048.8091. You see this is an internal chain of emails, the most recent of which is 26 August 2016?---Yes.

And you will see you're on this chain of emails?---Yes.

25 And have you reviewed this chain of emails in the course of preparing to give evidence today?---No.

Okay. Let's go from the back of the document. If we go to NAB.076.048.8095. You will see at the top of the page it says "Hi, Anne". Anne we know from the next page, is Anne Wong. Do you know what Ms Wong's role was?---I cannot recall.

30 It's an email from Karen Anne Herald. Do you know what Ms Herald's role was?---Yes. She was in the second line risk team.

Okay. And she's providing comments on a management paper?---Yes.

35 And I just want to ask you about a few of those things. You see point 3:

*Pre-SWiFT employer service fee – has there been any work performed to ensure that we don't have a similar issue with it?*

40 ?---Yes.

I asked you some questions about this earlier. Does that help you to recall whether internally within NAB a question was raised as to whether services had been provided in exchange for the employer service fee?---No, I do not recall.

45 The view you now have or recall was that you thought the employer service fee was not a fee for service, it was a commission. Is that right?---Yes.

So if it was a commission, it wouldn't be necessary to do any similar work to the PSF because it wouldn't matter whether services had been provided or not?---I don't have the context for this statement, and – so I can't comment on your question.

5 All right. And then you see point number 11:

*Appendix 2 – general services provided.*

10 You see the comment from Ms Herald is:

*Aren't these services provided to all members, not just unadvised? Would these already be part of admin fees? Is there a member equity issue raised re unadvised members cross-subsidising the advised members for these services (in effect)? Some of the services seem like marketing activities.*

15

Do you have any recollection of what the issue was that was raised as to services being provided?---No, not in this – not in the context of this email.

20 Okay. We will – we will come back to that. Can we – could we then go to the front of the email. I'm sorry, could we move that over to one side of the page and then bring up on one side of the screen and then bring up on the other side of the screen NAB.076.048.8133. Would it help if I read that out again? Good?---Thank you.

25 This is a branch off of the same chain of emails. I apologise for mixing my metaphors there. Can we go over the page to NAB.076.048.8134. It's on the right-hand side?---Okay. 8134? I don't have that on the screen.

No, it should come up in a moment?---I think I've got it here.

30 So if we go to that second page, you can see at the bottom of the page there's a reply from Tim Stimson back to Damien Murphy. Now, Damien Murphy was the chief risk officer at NAB?---Yes.

35 And still is the chief risk officer?---Yes.

And Tim Stimson was who?---Tim Stimson was in a project type role.

40 And then if we go over the page – you can see a bit more clearly in red here the response to that question that is raised by Ms Herald. It's coming up but I can read it out. Her question is:

*Pre-SWiFT employer service fee, has there been any work performed to ensure that we don't have a similar issue with it?*

45 And the response in red is:

*Not yet addressed. We have requested Grant and Lara provide additional comment.*

5 Again, none of this brings back any recollection for you of having considered the issue of whether the employer service fee - - -?---No, it does not.

10 All right. And if we then just tie off on that, if we go back to the left-hand side to the first email, the point that Ms Herald is explaining is that the management paper, that is the 2012 management paper, explains that there was an existing fee for service in place that was converted into the plan service fee. And that's why she has this question about what services were being provided for unadvised members where the employer service fee was involved. So you understand what the issue is, Mr Carter?---I understand what you're asking.

15 Yes. And the issue is, just so we're clear for the Commissioner, is that if you had unadvised members being charged the employer service fee, and they didn't have a linked adviser, then the obvious issue would be that then NAB ought to also refund the employer service fee to those pre-SWiFT members. You understand that?---I understand what you're asking.

20 But you don't remember – notwithstanding this chain of emails that you're on – you don't remember that issue having arisen?---No, I don't recall. The context of this email was all around our remediation to the plan service fee event which was introduced in 2012, and – and that was absolutely the focus of our work.

25 All right. I tender those two emails, Commissioner.

THE COMMISSIONER: I think they might be better as separate exhibits, Mr Hodge.

30 MR HODGE: Yes, thank you.

THE COMMISSIONER: Exhibit 5.17 emails August '16, Carter and others entitled PSF Management Briefing Paper version 6, NAB.076.048.8091. That's exhibit 5.17.

35 **EXHIBIT #5.17 EMAILS AUGUST '16, CARTER AND OTHERS ENTITLED PSF MANAGEMENT BRIEFING PAPER VERSION 6 (NAB.076.048.8091)**

40 THE COMMISSIONER: Exhibit 5.18 will be emails August '16 entitled PSF Management Briefing Paper NAB.076.048.8133, exhibit 5.18.

45 **EXHIBIT #5.18 EMAILS AUGUST '16 ENTITLED PSF MANAGEMENT BRIEFING PAPER (NAB.076.048.8133)**

MR HODGE: Thank you. Commissioner, I note the time. Is that a convenient time?

5 THE COMMISSIONER: Yes. How are we travelling for time, Mr Hodge?

MR HODGE: I will finish – I expect to finish Mr Carter certainly in the morning tomorrow and to then start Ms Smith and to finish Ms Smith tomorrow as well. And then I hope to start the next witness also late tomorrow afternoon.

10 THE COMMISSIONER: Yes. Well, 9.30 tomorrow.

MR HODGE: Thank you, Commissioner.

15 THE COMMISSIONER: Yes. Adjourn to 9.30.

**<THE WITNESS WITHDREW**

**[4.01 pm]**

20 **MATTER ADJOURNED at 4.01 pm UNTIL TUESDAY, 7 AUGUST 2018**

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